(1)

No. 99-5525-CFY Title: Charles Thomas Dickerson, Petitioner
v.
United States

Docketed: August 2, 1999 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Jun 14 1999	Application (98A1059) to extend the time to file a petition for a writ of certiorari from June 30, 1999 to July 30, 1999, submitted to The Chief Justice.
	Jun 17 1999	Application (98A1059) granted by the Chief Justice extending the time to file until July 30, 1999.
	Jul 30 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 1, 1999)
	Aug 26 1999	Order extending time to file response to petition until October 1, 1999.
	Sep 28 1999	Order further extending time to file response to petition until November 1, 1999.
	Nov 1 1999	Brief amicus curiae of Washington Legal Foundation filed.
	Nov 1 1999	Brief of respondent United States filed.
	Nov 18 1999	DISTRIBUTED. December 3, 1999
	Dec 6 1999	Petition GRANTED. limited to Question 1 presented by the petition. Paul G. Cassell, Esquire, of Salt Lake City, Utah, is invitedto brief and argue this case, as amicus curiae, in support of the judgment below. SET FOR ARGUMENT April 19, 2000. **********
	Dec 10 1999	Motion of petitioner for appointment of counsel filed.
	Dec 15 1999	DISTRIBUTED. January 7, 2000 (page 32)
	Jan 6 2000	Order extending time to file petitioner's brief on the merits to and including January 28, 2000.
	Jan 10 2000	Motion for appointment of counsel GRANTED and it is ordered that James W. Hundley, Esquire, of Fairfax, Virginia, is appointed to serve as counsel for the petitioner in this case.
	Jan 18 2000	Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
	Jan 27 2000	Brief amici curiae of Griffin B. Bell, et al. filed.
	Jan 28 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jan 28 2000	Lodging consisting of 10 bound booklets received from counsel for amici Natl. Assn. of Criminal Defense Lawyers, et al.
	Jan 28 2000	Brief amicus curiae of American Civil Liberties filed.
	Jan 28 2000	Brief amicus curiae of Benjamin R. Civiletti filed.
	Jan 28 2000	Brief amicus curiae of National Legal Aid and Defender Association filed.
	Jan 28 2000	Brief of respondent United States filed.
	Jan 28 2000	Brief amicus curiae of Rutherford Insitute filed.
	Jan 28 2000	Brief amicus curiae of House Democratic Leadership filed.
	Jan 28 2000	Joint appendix filed.
	Jan 28 2000	Joint appendix in two volumes.

3 pp

Entry	Date	Proceedings and Orders
	Jan 28 2000	Brief of petitioner Charles Thomas Dickerson filed.
	Feb 22 2000	Order extending time to file brief of Court appointed amicus curiae in support of the judgment below to and including Thursday, March 9, 2000.
	Feb 25 2000	LODGING consisting of twenty copies of of ten memoranda submitted by the Solicitor General and distributed.
	Mar 6 2000	Brief amicus curiae of Center for Original Intent of the Constitution filed.
	Mar 6 2000	Record filed.
	Mar 9 2000	Brief of Court-Appointed amicus curiae urging affirmance of the judgement below filed.
	Mar 9 2000	Brief amici curiae of National Association of Police Organizations, et al. filed.
	Mar 9 2000	Brief amicus curiae of Maricopa County Attorney's Office filed.
	Mar 9 2000	Brief amici curiae of National District Attorneys Association, et al. filed.
	Mar 9 2000	Brief amici curiae of William Barr and Edwin Meese filed.
	Mar 9 2000	Brief amici curiae of Arizona Voices for Victims, et al. filed.
	Mar 9 2000	Brief amicus curiae of Fraternal Order of Police filed.
	Mar 9 2000	Brief amicus curiae of Bipartisan Legal Advisory Group U.S.House of Representatives filed.
	Mar 9 2000	Brief amicus curiae of Manning & Marder, Kass, Ellrod, Ramirez filed.
	Mar 9 2000	Brief amici curiae of Citizens for Law and Order, et al. filed.
	Mar 9 2000	Brief amicus curiae of Federal Bureau of Investigation Agents Assn. filed.
	Mar 9 2000	Brief amici curiae of Senators Orrin Hatch, et al. filed.
	Mar 9 2000	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Mar 9 2000	Brief amici curiae of Center for Community Interest, et al. filed.
	Mar 9 2000	Brief amici curiae of South Carolina, et al. filed.
	Mar 10 2000	CIRCULATED.
	Mar 24 2000	Motion of the Solicitor General for divided argument filed.
	Mar 27 2000	Letter from Court-Appointed amicus counsel containing copies of correspondence received and distributed.
	Mar 30 2000	Motion of the Solicitor General for divided argument DISTRIBUTED.
	Apr 3 2000	Motion of the Solicitor General for divided argument GRANTED.
	Apr 10 2000	Reply brief of respondent United States filed.
	Apr 10 2000	Reply brief of petitioner Charles Thomas Dickerson filed.
	Apr 18 2000	LODGING consisting of twenty copies of documents submitted by amici Orin Hatch, et al. distributed.
	Apr 18 2000	Response to lodging of amici Orin Harch, et al. distributed.
	Apr 19 2000	ARGUED.

No. 99-5525-CFY

Entry	Date	Proceedings and Orders
	Apr 20 2000	Letter from the Solicitor General received and distributed.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

99-5525 (2)

No. _____

Supreme Court, U.S.
FILED
JUL 30 1999
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

RECEIVED
SUPREME COURT U.S.
POLICE DEPARTMENT

Charles Thomas Dickerson,

Petitioner,

v.

United States of America,

Respondent.

2242

On Petition for Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

James W. Hundley
Briglia & Hundley, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703)385-8005

Counsel for Petitioner

July 30, 1999

87 pp (2)

99-5525
Dickerson
v.
U.S.

QUESTIONS PRESENTED

No. 1: Whether the passage of 18 U.S.C. § 3501 was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966)?

No. 2: Whether the Court of Appeals for the Fourth Circuit erred in considering *sua sponte* the applicability of 18 U.S.C. § 3501 when the issue was not properly raised and preserved by the government?

No. 3: Whether the Court of Appeals for the Fourth Circuit erred in reversing the trial court's ruling that evidence obtained during a search of the petitioner's home had to be suppressed as it was obtained pursuant to a facially deficient warrant which failed to state with particularity the items to be seized?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS AND ORDERS 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT 9

I. The *Miranda* warnings are constitutionally required; therefore, passage of 18 U.S.C. § 3501 was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court 9

II. The Court of Appeals erred in considering the applicability of 18 U.S.C. § 3501 because the issue was not properly raised and preserved by the government 15

III. Evidence obtained during a search of the petitioner's home should remain suppressed 18

A. The search was authorized by a facially deficient warrant which failed to state with particularity the items to be seized 18

B. The "good faith" exception to the warrant requirement is not applicable in the present case because the magistrate judge was misled and the warrant was so facially deficient that the executing officers could not have reasonably presumed it valid 19

CONCLUSION 22

CERTIFICATE OF SERVICE 23

APPENDIX

Appendix A: Fourth Circuit Court of Appeals decision dated February 8, 1999

Appendix B: United States District Court Order and Memorandum dated July 1, 1997

Appendix C: United States District Court Order and Memorandum dated August 4, 1997

Appendix D: Fourth Circuit Court of Appeals Order dated April 1, 1999

Appendix E: Fourth Circuit Court of Appeals Order dated April 14, 1999

TABLE OF AUTHORITIES

CASES

Andersen v. Maryland, 427 U.S. 463, 96 S.CT. 2737 (1976) 18

Arizona v. Roberson, 486 U.S. 675 (1988) 11

Ashwander v. Tennesse Valley Authority, 297 U.S. 288, 341 17

City of Boerne v. Florida, 117 S. Ct. 2157, 2163-64 (1997) 9

Davis v. United States, 512 U.S. 452 (1994) 17

Edwards v. Arizona, 451 U.S. 477 (1981) 13

Harris v. Rivera, 454 U.S. 339, 344-45 (1981) 12

Johnson v. United States, 117 S.Ct. 1544, 1550 (1997) 16

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927) 18

Michigan v. Tucker, 417 U.S. 433 (1974) 12

Minnick v. Mississippi, 498 U.S. 146 (1990) 11

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . *passim*

Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) 12

North Carolina v. Pearce, 395 U.S. 711 (1969) 13

Oregon v. Elstad, 470 U.S. 298 (1985) 12

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980) 18

Stansbury v. California, 511 U.S. 318 (1994) 11

United States v. Buck, 813 F2.d 588, 589 (2nd Cir. 1987) 19

United States v. Cedelle, 89 F.3d 181, 184 (4th Cir. 1996) 16

United States v. David, 83 F.3d 638, 641 (4th Cir. 1996) 15

United States v. Dickerson, 166 F.3d 667 (4th Cir. Feb. 8, 1999) ..... *passim*

United States v. Elie, 111 F.3d 1135 (4th Cir. 1997) 14

United States v. Leon, 463 U.S. 981 (1983) 19

United States v. Leong, No. 96-4876 (4th Cir. Sept. 19, 1997) 15

United States v. Olano, 507 U.S. 725, 731 (1993) 15

United States v. Robertson, 21 F.3d 1030, 1033 (10th Cir. 1994), cert. denied, 513 U.S. 891, 115 S.Ct. 238 (1994) 18

Withrow v. Williams, 507 U.S. 680, 690-95 (1993) 12

STATUTES

18 U.S.C. § 2 4

18 U.S.C. § 371 4

18 U.S.C. § 924(c) 4

18 U.S.C. § 2113(a) and (d) 4

18 U.S.C. § 3501 ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2106 1

28 U.S.C. § 2254(a) 7

Fed. R. Crim. P. 52(b) 8

TREATISE

Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, The Tulsa Law Journal, Vol. 34 14

CITATIONS TO OPINIONS AND ORDERS

This petition seeks review of the Fourth Circuit's decision in United States v. Charles T. Dickerson, 166 F.3d 667 (4th Cir. 1999), filed February 8, 1999. The opinion is included as Appendix A. The Fourth Circuit's decision reversed an unpublished decision of the United States District Court for the Eastern District of Virginia, United States v. Charles T. Dickerson, Criminal No. 97-159-A (E.D.Va. July 1, 1997), granting, in part, Mr. Dickerson's Motion to Suppress. The district court's Order and Memorandum Opinion are included as Appendix B. Following the district court's ruling, both the government and the petitioner filed motions asking the court to reconsider aspects of its initial ruling. The district court denied both motions. The decision, issued August 4, 1997, is reported at 971 F. Supp. 1023 (E.D.Va. 1997) and is attached as Appendix C.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on February 8, 1999. The petitioner filed a Petition for Rehearing and Petition for Rehearing *En Banc* which the Fourth Circuit denied on April 1, 1999.[1] On June 14, 1999, the petitioner applied for an extension of time in which to file a Petition for Writ of Certiorari. On June 17, 1999, the Chief Justice extended the time to and including July 30, 1999.

Pursuant to Rule 29 of the Rules of the United States Supreme Court, this Petition for Writ of Certiorari was timely filed on or before July 30, 1999. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

---

[1] In its Brief for the United States in Support of Partial Rehearing *En Banc*, the government agreed with and supported the petitioner's position that 18 U.S.C. § 3501 was unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Amendment V: Rights of Accused in Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall nay person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

18 U.S.C. § 3501
Admissibility of Confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or District of Colombia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

* * * * *

Constitution of the United States
Amendment IV: Security from Unwarrantable Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Federal jurisdiction arose in the district court when, on January 28, 1999, the petitioner, Charles T. Dickerson, was arrested and charged by criminal complaint with one count of aiding and abetting a bank robbery in violation of 18 U.S.C. §§ 2 and 2113(a) and (d). On April 16, 1997, Mr. Dickerson was indicted by a federal grand jury in the Eastern District of Virginia on one count of conspiracy to commit bank robbery in violation of 18 U.S.C. § 371, three counts of bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and three counts of using a firearm during a bank robbery in violation of 18 U.S.C. § 924(c).[2]

The facts material to consideration of the questions presented in this Petition for a Writ of Certiorari are as follows:

On January 24, 1997, a NationsBank in Alexandria, Virginia was robbed. Shortly thereafter, Special Agent Christopher Lawlor of the Federal Bureau of Investigation learned that the robbery had been committed with a large, silver, semi-automatic handgun, that the robber had placed the stolen money in a black leather backpack, that approximately $876 was taken in the robbery, and that no dye-pack or bait money was given to the robber. Witnesses had seen the robber, later identified as James Rochester, leave the bank and enter an Oldsmobile Cierra. Using the description of the getaway car, including its license plate number, the FBI determined that the petitioner, Charles Dickerson, was the car's owner.

---

[2] A superseding indictment was issued on June 24, 1997. It charged the same offenses except it alleged that Mr. Dickerson acted as an aider and abettor to the bank robberies and firearm offenses in violation of 18 U.S.C. § 2.

Agent Lawlor and several other law enforcement officers went to Mr. Dickerson's home at 8313 Garland Avenue, Apartment 3, in Takoma Park, Maryland. They arrived at the residence at approximately 5:30 p.m. on the evening of January 27, 1997. An Oldsmobile Cierra registered to Mr. Dickerson was parked in the vicinity. The officers set-up surveillance. After waiting over one hour, they knocked on Mr. Dickerson's door.

Approximately ten FBI agents and local police officers were outside of Mr. Dickerson's apartment with their guns drawn when Mr. Dickerson answered the door. Three or four, including Special Agent Lawlor, entered Mr. Dickerson's apartment without a warrant and without the consent of Mr. Dickerson. The officers asked Mr. Dickerson to accompany them to the FBI field office in Washington, D.C. Given the circumstances, Mr. Dickerson felt he had no choice but to do as the officers requested. He asked to retrieve his coat, turned, and walked to his bedroom. Upon reaching the room, Mr. Dickerson realized that Agent Lawlor and another officer had followed him to his bedroom from his apartment's entrance.

Mr. Dickerson picked up his coat. Under the coat was $552 in cash. Mr. Dickerson had won this money on a recent trip to Atlantic City. The agents forced Mr. Dickerson to count out this money on the bed before allowing him to put it in his pocket. No evidence linking Mr. Dickerson to the robbery of the NationsBank was observed by the officers in the apartment. Prior to leaving, Mr. Dickerson was asked to consent to a search of the residence. He refused and was driven by the officers to the FBI field office.

Once at the station, Mr. Dickerson was interviewed by Agent Lawlor and another FBI agent. He was not advised of his Miranda rights prior to this interrogation. Initially, Mr. Dickerson denied any involvement in the robbery, admitting only that he had been in the vicinity

of the bank at the time it was robbed.

After obtaining this statement, Agent Lawlor left the interrogation room and placed a call to the Honorable James E. Kenkel, United States Magistrate Judge for the District of Maryland, in order to obtain a search warrant for Mr. Dickerson's home. As probable cause for the warrant, Agent Lawlor described the circumstances of the robbery and the fact that the getaway car had been traced to Mr. Dickerson. In addition, Agent Lawlor noted that Dickerson, who had been behind on his rent, had just paid his landlord $1,350. He told the magistrate that earlier in the evening he and other officers had gone to Mr. Dickerson's home in Maryland and escorted him to the FBI Field Office in Washington, D.C. Agent Lawlor also mentioned the $552 he had seen in Mr. Dickerson's possession. Agent Lawlor then asserted that exigent circumstances necessitated an immediate search of the home because "Mr. Dickerson [was] not under arrest. . . and [was] free to go home." Agent Lawlor said he believed that if Mr. Dickerson went home, he would destroy evidence of the robbery under investigation.

During the conversation between Judge Kenkel and Agent Lawlor, no discussion took place concerning what particular items were being sought under the warrant. The warrant stated only that there was probable cause to believe "evidence of the crime of bank robbery" would be found in Mr. Dickerson's home. Judge Kenkel approved the warrant at 8:50 p.m. At the time Agent Lawlor requested the warrant, he knew the $552 was no longer in the residence but was at the FBI field office. In fact, Mr. Dickerson had allowed Agent Lawlor to count and seize the money prior to the agent's call to Judge Kenkel. Agent Lawlor had seen no other incriminating evidence in the home and "had no way of knowing" what a search might uncover. After obtaining the warrant, Agent Lawlor dispatched other officers to Mr. Dickerson's home to conduct the

search. The search uncovered a silver .45 caliber handgun, dye stained money, a bait bill from a separate bank robbery, and other evidence.

After obtaining the warrant, Agent Lawlor returned to the interrogation room and told Mr. Dickerson his home was going to be searched. Mr. Dickerson then agreed to make another statement. He told the agents he had gone to Alexandria on January 24, 1997, with a man named Jimmy. Mr. Dickerson knew Jimmy because Jimmy was married to his cousin. While in Alexandria, Mr. Dickerson said he parked his car and went into a bagel shop. Initially, Jimmy waited in the car, but as Mr. Dickerson walked away, he saw Jimmy get out of the car. When Mr. Dickerson returned to his car, Jimmy was already back in it. When Mr. Dickerson began to drive away, Jimmy told him to pull over. He complied, thinking Jimmy had to use the bathroom. Jimmy got out and returned after a few minutes. When Mr. Dickerson stopped at a stop sign, Jimmy got out of the car and put something in the trunk. When Mr. Dickerson stopped at a red light a short distance down the street, Jimmy told him to run it. It was at this point that Mr. Dickerson began to suspect that Jimmy may have committed a robbery. Mr. Dickerson knew that Jimmy had come to the Washington, D.C. area after committing a number of robberies in Georgia.

After giving this statement, Mr. Dickerson was advised for the first time of his rights under Miranda v. Arizona 384 U.S. 436 (1966). This was done using a rights waiver form which Mr. Dickerson signed. After completing this form, Mr. Dickerson was formally placed under arrest. He then left the field office with the agents and showed them Jimmy's apartment in Oxon Hill, Maryland. Based on this information, the FBI obtained the arrest of James Rochester, an individual wanted in connection with a number of bank robberies along the east coast. Following

his arrest, James Rochester admitted that he had robbed several banks, including the NationsBank in Alexandria on January 24, 1997.

On May 19, 1997, the petitioner filed a Motion to Suppress Statements and Physical Evidence. On May 30, 1997, a hearing on the Motion to Suppress was held in the United States District Court for the Eastern District of Virginia, Alexandria Division, before the Honorable James C. Cacheris. The matter was taken advisement by the district court, and, at the court's request, the parties filed supplemental memoranda in support of their positions.

On July 1, 1997, the district court issued an Order and Memorandum Opinion granting the defendant's Motion to Suppress as to his statements offered at the FBI field Office on January 27, 1997, and as to items discovered during the search of his home that same evening. The portion of the motion seeking suppression of items discovered during a search of the defendant's Oldsmobile Cierra was denied.

On July 15, 1997, the United States filed a motion asking the district court to reconsider that portion of its Order granting suppression of the defendant's statement and the items discovered in the search of his home. A hearing on the Motion to Reconsider was held on August 1, 1997. On August 4, 1997, the district court denied the United States' Motion for Reconsideration. On August 6, 1997, the district court stayed trial of this matter pending appeal by the United States. On September 2, 1997, pursuant to 18 U.S.C. § 3731, the United States noticed its appeal.

On February 8, 1999, a panel of the Fourth Circuit Court of Appeals, in a 2 to 1 decision, reversed the district court. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999). As to Mr. Dickerson's statements, the Court ruled that, although taken in violation of the requirements of

Miranda, the statements were otherwise voluntarily made and therefore admissible pursuant to 18 U.S.C. § 3501. As to the evidence obtained from Mr. Dickerson's home, the Court ruled that the warrant's sole directive to search for "evidence of the crime of bank robbery" was sufficiently particular to pass constitutional muster, and, in any event, was relied upon in good-faith by the executing officers.

By Amended Order dated April 1, 1999, the full Fourth Circuit, by an eight to five vote, denied Mr. Dickerson's Petition for Rehearing and Petition for Rehearing *En Banc*.

ARGUMENT

I. The *Miranda* warnings are constitutionally required; therefore, passage of 18 U.S.C. § 3501 was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court.

In enacting 18 U.S.C. § 3501, Congress attempted to secure the admissibility in federal courts of statements that would otherwise be suppressed under the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). The Court has recently emphasized, however, that Congress has no power to overrule its interpretations of the Constitution. City of Boerne v. Florida, 117 S. Ct. 2157, 2163-64 (1997). As the Fourth Circuit panel opinion in this case recognized, the question of whether § 3501 or *Miranda* governs the admissibility of Mr. Dickerson's statements depends on whether Congress possesses the authority to overrule *Miranda*. Dickerson, 166 F. 3d at 672. If *Miranda* represents the Supreme Court's interpretation of the Constitution, § 3501 is invalid.

Contrary to the Fourth Circuit's conclusion, the holding of *Miranda* was deemed

constitutionally compelled by the Supreme Court. In deciding *Miranda*, the Court was not interpreting a statute, a federal rule of procedure, or a rule of evidence. Rather, the Court applied the Fifth Amendment's privilege against self-incrimination in the context of custodial interrogation and constructed a rule as a result of that application. Thus, the Court was engaging in constitutional decision making.

Proponents of § 3501 attempt to rely on Supreme Court cases referring to the *Miranda* warnings as "prophylactic" to argue that *Miranda* is not based on the Fifth Amendment and therefore can be overruled by statute. The fallacy of this position is revealed by three separate facets of Supreme Court precedent: (i) the language of *Miranda* itself; (ii) the Supreme Court's continued application of *Miranda* in state court cases; and (iii) the Supreme Court's recognition that an alleged *Miranda* violation is cognizable in federal habeas review. All three aspects of *Miranda* demonstrate that the decision is firmly based in the constitutional guarantees of the Fifth Amendment.

The *Miranda* Court repeatedly and unequivocally stated throughout its opinion that its decision was based in the Constitution itself. The first paragraph of the opinion established this fundamental point:

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

384 U.S. at 439. Later in the opinion, the Court reiterated that the "constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant

questioned while in custody or otherwise deprived of his freedom of action in any significant way." Id. at 445. The holding of the Court was also described as unmistakably based on a constitutional violation. The confessions at issue were held inadmissible because each was obtained "under circumstances that did not meet constitutional standards for protection of the privilege." Id. at 491.

Although the *Miranda* Court invited Congress and the states to develop other effective ways to protect the constitutional rights of individuals subjected to custodial interrogation, it emphasized that "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed." 384 U.S. at 467. This language clearly did not leave Congress free to eliminate the requisite warnings through legislation designed to overturn the decision. Indeed, the Court emphasized that "the issues presented are of constitutional dimension and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Id. at 490-91.

An examination of the Supreme Court's jurisprudence since *Miranda* further demonstrates that *Miranda* cannot properly be viewed as merely an exercise of the Court's supervisory powers. Perhaps the most important indication that the Court does not regard *Miranda* as resting simply on its supervisory powers is the fact that the Court has continued to apply the *Miranda* rules to cases arising in state courts. See, e.g., Stansbury v. California, 511 U.S. 318 (1994); Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988). In fact, three of the four consolidated cases which comprise *Miranda* arose in state courts. Although the Court has the authority to announce rules of procedure and evidence binding on federal courts, it has

consistently disclaimed any such supervisory authority over the state courts. With respect to cases tried before state tribunals, the Court's "authority is limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991). The federal judiciary "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution." Harris v. Rivera, 454 U.S. 339, 344-45 (1981). As such, the Supreme Court's continued application of *Miranda's* exclusionary rule in state cases leads to the inescapable conclusion that *Miranda* rests on constitutional underpinnings.[3]

Finally, the Supreme Court has held that claims that a conviction rests on statements obtained in violation of *Miranda* are cognizable on federal habeas review. Withrow v. Williams, 507 U.S. 680, 690-95 (1993). Habeas review is only available for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). *Miranda* certainly does not involve laws or treaties. Thus, the Court's holding in *Withrow* depends on the conclusion that the requirements of *Miranda* arise from and protect constitutional rights.

In attempting to prevent *Withrow* from extending federal habeas review, the government argued that since the *Miranda* rules "are not constitutional in character, but merely

[3] Michigan v. Tucker, 417 U.S. 433 (1974), and Oregon v. Elstad, 470 U.S. 298 (1985), both cases relied upon by the Fourth Circuit to support its conclusion that *Miranda* is not a constitutionally based decision, arose in state courts. Although both decisions narrowed the scope of *Miranda's* exclusionary rule (Tucker by declining to apply the holding retroactively to statements obtained prior to the *Miranda* decision; Elstad by declining to suppress a properly obtained confession after earlier statements were obtained in violation of *Miranda*), both decisions reaffirmed *Miranda's* basic conclusion that unwarned statements must be excluded from the government's case-in-chief. Tucker, 417 U.S. at 445; Elstad, 479 U.S. at 307.

'prophylactic,'" federal habeas review should not extend to claims based on violations of these rules. Withrow, 507 U.S. 690. The Court declined to reach this conclusion. Although Justice Souter, writing for the majority, did not deny that "we have sometimes called the *Miranda* safeguards 'prophylactic' in nature," he concluded that "[p]rophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right." 507 U.S. at 691. The Court went on to state that *Miranda* "brace[s] against 'the possibility of unreliable statements in every instance of in-custody interrogation,'" and thereby "serves to guard against 'the use of unreliable statements at trial." 507 U.S. at 692.

Miranda is hardly the sole example of a constitutionally based decision which contains a bright-line rule. For example, in North Carolina v. Pearce, 395 U.S. 711 (1969), the Court held that a "presumption of vindictiveness" would arise whenever a judge imposed a more sever sentence after a defendant had successfully overturned his original conviction on appeal. In such circumstances, the reason for the harsher sentence "must affirmatively appear [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Pearce, 395 U.S. at 726. Absent such a showing, vindictiveness against the defendant was to be presumed and the sentence he received on retrial struck down as a violation of due process.

Likewise, in Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that when a suspect effectively asserts his right to a lawyer (as opposed to his right to remain silent), the suspect may not be subjected to further police questioning until counsel has been made available to him unless he himself initiates further conversation with the police. *Edwards* held, in effect,

that when a custodial suspect invokes his right to counsel, there is a conclusive presumption that any subsequent waiver of rights that comes at police instigation is compelled. In essence, *Edwards* created a new, constitutionally mandated rule to protect a suspect's Sixth Amendment rights which built on and reinforced the rules of *Miranda*.[4]

The inescapable conclusion from the Supreme Court's most recent jurisprudence is that it would be unconstitutional to apply § 3501 to admit a defendant's statement in a case such as this where *Miranda* would require its suppression. Although described at times as "prophylactic," the requirements announced in *Miranda* cannot be explained as anything other than "necessary to assure compliance with the dictates of the Federal Constitution." Harris v. Rivera, 454 U.S. 339, 344-45 (1981). As such, it is a rule that Congress cannot supersede by legislation. See City of Boerne v. Flores, 117 S.Ct. 2157, 2163-2164 (1997).[5]

---

[4] See Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist*, The Tulsa Law Journal, Vol. 34, pp. 471-475 (1999).

[5] Should the Court deny this petition and thereby affirm the Fourth's Circuit's decision that 18 U.S.C. § 3501 rather than *Miranda* now governs the admissibility of inculpatory statements, the petitioner would ask that the matter be remanded for further proceedings in the district court to determine whether the voluntariness standard of § 3501 was met in this case. The Fourth Circuit concluded that such action was unnecessary because the district court found that the statements, though obtained in violation of *Miranda*, were otherwise voluntary. The Fourth Circuit relied on a footnote in the district court's decision denying reconsideration to support this conclusion. See United States v. Dickerson, 971 F. Supp. 1023, n. 1 (E.D.Va. 1997). The footnote in question served to deny a motion in which Mr. Dickerson argued that his arrest was not supported by probable cause and that any evidence, including all statements by James Rochester, should be suppressed as "fruits of the poisonous tree." The district court misconstrued this Fourth Amendment argument as grounded in the Fifth Amendment and applied United States v. Elie, 111 F.3d 1135 (4th Cir. 1997), to deny applicability of the poisonous tree doctrine. Neither the district court nor Mr. Dickerson ever addressed the standards set forth in § 3501 because it was not recognized as controlling. If this Court affirms the substantial change in Fifth Amendment law at issue herein, the petitioner should be given a full opportunity to argue his case in light of these changes.

II. The Court of Appeals erred in considering the applicability of 18 U.S.C. § 3501 because the issue was not properly raised and preserved by the government.

As discussed above, if this Court addresses validity of § 3501, it must declare it unconstitutional. However, due to this case's unusual procedural posture, the Court should decline to reach the constitutional issue. Instead, the Court should rule that the Fourth Circuit erred in reaching *sua sponte* the applicability of 18 U.S.C. § 3501 when the government never raised or preserved the issue. By failing to raise the issue, the government waived it. In light of this waiver, the Court of Appeals, in deciding whether to raise the issue *sua sponte* should have determined whether the district court committed plain error in failing to consider the effect of § 3501 on the admissibility of Mr. Dickerson's statements. This the Fourth Circuit failed to do. Instead, the appellate court opined:

> Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. Here, the district court's suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

United States v. Dickerson, 166 F. 3d 672 (4th Cir. 1999).

Any review by an appellate court of an error that has not been properly preserved for review must be solely for plain error pursuant to Fed. R. Crim. P. 52(b). See United States v. Olano, 507 U.S. 725, 731 (1993); United States v. David, 83 F.3d 638, 641 (4th Cir. 1996); United States v. Leong, No. 96-4876 (4th Cir. Sept. 19, 1997) (unpublished). Rule 52(b) requires that three elements be met before an appellate court may notice an error not preserved for review: The alleged defect "must, in fact, be error; the error must be plain; and it must affect. . .

substantial rights." Olano, 507 U.S. at 731-32; United States v. Cedelle, 89 F.3d 181, 184 (4th Cir. 1996). Even if these elements are satisfied, an unpreserved error should not be noticed unless failure to do so would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. ___, 117 S.Ct. 1544, 1550 (1997); Cedelle, 89 F.3d at 184.

In the present case, the unpreserved "error" does not satisfy the criteria of Rule 52(b). Assuming *arguendo* that there was "error" and that this error "affected substantial rights," irrefutably the error was not "plain." To be "plain," an error must be "clear" or "obvious." Olano, 507 U.S. at 734. That statements obtained in violation of the clear requirements of *Miranda* might otherwise be admissible under § 3501 is anything but clear or obvious. No authority controlling this question had been set forth by this Court at the time the district court decided the motion to suppress, nor had any firm rule emerged in the other courts of appeals. See Leong, Slip opinion at 4-6. As the trial court did not commit plain error in failing to examine the effect of § 3501 on the admissibility of the defendant's statements, this Court should reverse the Fourth Circuit for its erroneous decision to raise the question *sua sponte*. See David, 83 F.3d at 642 (explaining that when "an error is unclear both at the time of the trial and at the time of appeal" it is not plain and review is barred).

No party with standing requested that the appellate court consider the effect of § 3501. Therefore, no case or controversy was ever properly raised concerning the statute's constitutionality. As noted by Justice Brandeis over sixty years ago, prudential considerations, as well as long-established judicial practice, demand that a court "refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our

judicial function, when the question is raised by a party whose interests entitle him to raise it." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (Brandeis, J., concurring). Even Justice Scalia in Davis v. United States, 512 U.S. 452 (1994), cited by the Fourth Circuit to support its decision to address the question *sua sponte*, recognized the impropriety of invoking § 3501 at such a late stage in the proceedings: "I agree with the Court that it is proper, given the Government's failure to raise the point, to render judgment without taking account of § 3501." Davis, 512 at 464.[6] No party with standing has sought a ruling on the legality and effect of § 3501 in this case. Accordingly, this Court should reverse the Fourth Circuit and refrain from unnecessarily deciding such an important issue here.

For all the reasons discussed above, this Court should reverse the Fourth Circuit and decline to address the substantive effect of § 3501 in this case. The district court's failure to consider the statute did not constitute plain error, and no case or controversy has been presented because no party has sought a ruling regarding the applicability of § 3501 in this case.

---

[6] As justification for addressing this issue *sua sponte*, the panel referred to Justice Scalia's concurring opinion in Davis, 512 U.S. at 465, wherein he noted that the government's failure to invoke § 3501 "may have produced – during an era of intense national concern about the problem of run-away crime – the acquittal and the nonprosecution of many dangerous felons." The Fourth Circuit then stated that this "was just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted." Dickerson, 166 F. 3d at . This misstates the record in this case. Mr. Dickerson never admitted to knowingly participating in any bank robberies. He only stated that he was aware James Rochester had robbed banks. He denied acting as a lookout or as a getaway driver.

III. Evidence obtained during a search of the Appellee's home should remain suppressed.

A. The search was authorized by a facially deficient warrant which failed to state with particularity the items to be seized.

The warrant requirement of the Fourth Amendment demands particularity. It prohibits the use of general warrants. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980); Andersen v. Maryland, 427 U.S. 463, 96 S.CT. 2737 (1976). The warrant requirement "makes general searches. . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927).

The warrant approved by the magistrate judge to search Mr. Dickerson's home was drafted in the most general of terms. It authorized an intrusion into a private home for "evidence of the crime of bank robbery." Even if circumstances only permit a generic description of the items to be seized, "the Fourth Amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and 'warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.'" United States v. Robertson, 21 F.3d 1030, 1033 (10th Cir. 1994), cert. denied, 513 U.S. 891, 115 S.Ct. 238 (1994)(citations omitted).

In the present case, Agent Lawlor, at a minimum, could have specified for the magistrate judge the amount of money taken during the bank robbery, the denominations and the serial numbers of the currency taken, the descriptions of the robber's clothing, and the descriptions of the gun and backpack used in the robbery. As Robertson notes, generic warrants such as this

which do not contain any of the identifying characteristics known to the government violate the particularity requirement of the Fourth Amendment.

The language in the warrant at issue here lacks any limitation whatsoever on the kind of evidence sought because the investigating officers had no idea what might be found. As Judge Michael correctly noted in dissenting to this portion of the Fourth Circuit's majority opinion, "'evidence of the crime of bank robbery' is far too general. That description does nothing to confine the discretion of an executing officer. . . .Under this interpretation, virtually no piece of paper or property would be beyond the bounds of a search." Dickerson, 166 F.3d at 698.

The fact that the officers executing the warrant used appropriate discretion while searching does not validate an otherwise insufficient warrant. It is precisely this type of on the scene police discretion that the particularity requirement of the Fourth Amendment prohibits. This same use of on the scene police discretion was addressed in United States v. Buck:

> While it can safely be said that the police here performed reasonably under the circumstances. . . they clearly did not insure that all the known facts were included in the warrant. The warrant only described the crimes -- and gave no limitation whatsoever on the kind of evidence sought. In short, "the warrant left it entirely to the discretion of the officials conducting the search to decide what items were to be seized, and thus was not permissible under the Fourth Amendment.

813 F.2d 588, 589 (2nd Cir. 1987).

B. The "good faith" exception to the warrant requirement is not applicable in the present case because the magistrate judge was misled and the warrant was so facially deficient that the executing officers could not have reasonably presumed it valid.

Pursuant to the "good-faith" exception adopted in United States v. Leon, 463 U.S. 981 (1983), evidence obtained by law enforcement officers acting in reasonable reliance on a search

warrant issued by a detached and neutral magistrate but ultimately found to be invalid can still be used in the prosecution's case-in-chief. Even under this broad exception, however, suppression is still appropriate under certain situations in which an officer's reliance on a warrant could not be deemed reasonable. An "officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was not properly issued." Leon, 468 U.S. at 922.

Leon outlined four situations in which an officer's reliance on a search warrant would not be reasonable:

> (1) the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless disregard of the truth;
>
> (2) the magistrate wholly abandoned his detached and neutral judicial role;
>
> (3) the warrant was based on an affidavit that was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
>
> (4) the warrant was facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers could not reasonably presume it to be valid.

468 U.S. at 923. Under *Leon*, the proper test of an officer's good faith is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922, n. 23.

In this case, Agent Lawlor told the magistrate judge that an expedited telephonic warrant was necessary because Mr. Dickerson was not under arrest and might return to his home and destroy evidence. The credibility of this assertion is questionable because Agent Lawlor did not

know any evidence was in the home to be destroyed. He had been in Mr. Dickerson's home earlier in the evening and had not seen any evidence relating to the bank robbery investigation. More importantly, Agent Lawlor's statement that Mr. Dickerson was not under arrest was misleading. As the district court found, the assertion that Mr. Dickerson was free to leave was incredible.

Agent Lawlor improperly led the magistrate judge to believe that exigencies existed which necessitated an immediate, telephonic response to his application. He also failed to fully share with the magistrate his knowledge concerning what items might be seized during the search. When questioned at the suppression hearing about the language in the warrant authorizing a search for "evidence of the crime of bank robbery," Agent Lawlor attempted to attribute this to the magistrate judge despite that the fact that nothing in the transcript of the telephonic application to the magistrate supports this testimony.

Agent Lawlor's conduct leads to an inevitable conclusion: he misled the magistrate judge with information that he knew was false or would have known was false except for his reckless disregard of the truth. Given this, any subsequent reliance on the search warrant by other officers was unreasonable rendering the good-faith exception inapplicable.

Even if Agent Lawlor's conduct did not constitute an intentional or reckless disregard for the truth, the good-faith exception is still inapplicable because the warrant was so facially deficient, by failing to particularize the things to be seized, that the executing officers could not reasonably have presumed it valid. As discussed above, the search warrant failed to state with any particularity what items were to be seized. An objectively reasonable officer certainly would have

realized this deficiency. To argue to the contrary is to argue that a reasonable officer is one with no understanding of the Fourth Amendment's particularity requirement.[7]

CONCLUSION

Based on the foregoing, the petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and review the merits of the Fourth Circuit Court of Appeal's decision reversing the district court's suppression of evidence.

Respectfully submitted,

CHARLES THOMAS DICKERSON
By Counsel

James W. Hundley
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703)385-8005

[7] In applying the good-faith exception to the exclusionary rule, the Fourth Circuit improperly relied on the affidavit of Agent Wenko to conclude that the searching officer had sufficient knowledge to properly tailor his search. Dickerson, 166 F.3d at 695. This information, however, was never properly presented by the government. As the Fourth Circuit held, this evidence was not offered to the district in a timely manner, and the district court did not abuse its discretion in failing to consider it. Id., 166 F.3d at 680. As such, it should not be relied upon to assert the good-faith exception.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari was served by first class mail, postage prepaid, this 30th day of July, 1999, to:

Vincent L. Gambale
U.S. Attorneys Office
Eastern District of Virginia
Alexandria Division
2100 Jamieson Avenue
Alexandria, Virginia 22314

Lisa Simotas, Attorney
U.S. Department of Justice
Criminal Division
Appellate Section
P.O. Box 899
Benjamin Franklin Station
Washington, D.C. 20044-0899

Paul G. Cassell
Washington Legal Foundation
(Counsel of Record)
University of Utah, College of Law
Salt Lake City, UT 84112
Washington, D.C. 20036

Jonathan L. Abram
Counsel for the American Civil Liberties Union
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Deanne E. Maynard
Counsel for National Association for
Criminal Defense Lawyers
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005

Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 30, 1999.

James W. Hundley

166 F.3d 667

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

CHARLES THOMAS DICKERSON, Defendant-Appellee.

WASHINGTON LEGAL FOUNDATION; SAFE STREETS COALITION, Amici Curiae.

No. 97-4750

Argued: January 30, 1998
Decided: February 8, 1999

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CR-97-159-A)

Before WILLIAMS and MICHAEL, Circuit Judges, and KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Williams wrote the opinion, in which Senior Judge Kiser joined. Judge Michael wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Vincent L. Gambale, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Paul George Cassell, College of [Page 2] Law, UNIVERSITY OF UTAH, Salt Lake City, Utah, for Amici Curiae. James Warren Hundley, BRIGLIA & HUNDLEY, Fairfax, Virginia, for Appellee. ON BRIEF: Helen F. Fahey, United States Attorney, William G. Otis, Senior Litigation Counsel, Justin W. Williams, Assistant United States Attorney/Chief, Criminal Division, Robert A. Spencer, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Daniel J. Popeo, Paul D. Kamenar, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amici Curiae.

OPINION

WILLIAMS, Circuit Judge:

In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.

I.

On January 27, 1997, Charles T. Dickerson confessed to robbing a series of banks in Maryland and Virginia. Dickerson was subsequently indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), three counts of bank robbery in violation of 18 U.S.C.A. [Page 3] § 2113(a) & (d) (West Supp. 1998), and three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c) (1) (West Supp. 1998). Shortly thereafter, Dickerson moved to suppress his confession. Although the district court specifically found that Dickerson's confession was voluntary for purposes of the Fifth Amendment, it nevertheless suppressed the confession because it was obtained in technical violation of *Miranda*. /1

In ruling on the admissibility of Dickerson's confession, the district court failed to consider § 3501, which provides, in pertinent part, that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is evident that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court. Thus, if Congress possessed the authority to enact § 3501, Dickerson's voluntary confession is admissible as substantive evidence in the Government's case-in-chief.

Congress enacted § 3501 as a part of the Omnibus Crime Control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994), the Court has never considered whether the statute overruled *Miranda*, *see Davis v. United States*, 512 U.S. 452, 457 n.* (1994). Indeed, although several lower courts have found that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, *see United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997), no Administration since the provision's enactment has pressed the point, *see Davis*, 512 U.S. at 463-64 (Scalia, J., concurring) (noting [Page 4] that "the provision has been studiously avoided by every Administration . . . since its enactment more than 25 years ago"); *see also* U.S. Dep't of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986) (discussing "[t]he abortive implementation of § 3501" after its passage in 1968). In fact, after initially declining to take a position on the applicability of § 3501, *see Davis*, 512 U.S. at 457 n.*, the current Administration has now asserted, without explanation, that the provision is unconstitutional, *see* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997).

Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. *See Davis*, 512 U.S. at 465 (Scalia, J., concurring). In addition to "caus[ing] the federal judiciary to confront a host of *Miranda* ' issues that might be entirely irrelevant under federal law," *id.*, Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced - during an era of intense national concern about the problem of run-away crime - the acquittal and the nonprosecution of many dangerous felons," *id.* This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. *See United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993). Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

Determining whether Congress possesses the authority to enact § 3501 is relatively straightforward. Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. *See Carlisle v. United States,* 517 U.S. 416, [Page 5] 426 (1996); *Palermo v. United States,* 360 U.S. 343, 345-48 (1959). Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. Clearly it is not. At no point did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, 384 U.S. at 467, disclaimed any intent to create a "constitutional straightjacket," *id.,* referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Since deciding *Miranda,* the Supreme Court has consistently referred to the *Miranda* warnings as "prophylactic," *New York v. Quarles,* 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker,* 417 U.S. 433, 444 (1974). We have little difficulty concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional. As a consequence, we hold that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda.*

II.

Because of the unique posture of this case, *i.e.,* an interlocutory appeal from the denial of a motion to reopen a suppression hearing, and the significant legal questions raised therein, we have set forth the factual background and the procedural history in painstaking detail. Although rather lengthy, we believe that it is helpful in understanding the important legal issues that must be addressed.

On January 24, 1997, an individual using a silver semi-automatic handgun and carrying a black leather bag robbed the First Virginia Bank in Old Town, Alexandria, Virginia, of approximately $876. An eyewitness saw the robber exit the bank, run down the street, and get into a white Oldsmobile Ciera with District of Columbia license plate number D5286. Within seconds, the robber exited the car, placed something in the trunk, and then re-entered the car on the passenger side. The car then drove away.

The subsequent investigation into the bank robbery revealed that the getaway car was registered to Charles T. Dickerson of Takoma [Page 6] Park, Maryland. On January 27, 1997, approximately ten FBI agents and an Alexandria police detective (the agents) traveled to Dickerson's Takoma Park address. Upon arrival, the agents noticed a white Oldsmobile Ciera with D.C. license plate number D5286 parked on the street in front of Dickerson's apartment. Special Agent Christopher Lawlor knocked on Dickerson's door and identified himself. After some delay, Dickerson opened the door. Special Agent Lawlor informed Dickerson that the agents were investigating a bank robbery.

Although the parties dispute whether the agents had consent to enter Dickerson's apartment, there is no dispute that several agents did, in fact, do so. After a short conversation, Special Agent Lawlor asked Dickerson if he would accompany them to the FBI Field Office in Washington, D.C. Dickerson agreed, /2 but requested that he be allowed to retrieve his coat from his bedroom. As Dickerson picked up his coat, Special Agent Lawlor noticed a large amount of cash on the bed. After placing the money in his coat pocket, Dickerson told the agents that it was gambling proceeds from Atlantic City. After denying the agents' request to search his apartment, Dickerson rode with the agents to the FBI Field Office. Dickerson was not formally placed under arrest and was not handcuffed. Several agents, including Agent Lawrence Wenko, remained in the vicinity of Dickerson's apartment.

At the FBI Field Office, Dickerson was interviewed by Special Agent Lawlor and Detective Thomas Durkin of the Alexandria Police Department. Dickerson denied any involvement in the robbery, but admitted that he had driven to Old Town on the morning in question to look at a restaurant. While in the vicinity of the First Virginia Bank, Dickerson claims that he ran into an old friend named Terrance, who asked for a ride to Suitland, Maryland. Dickerson agreed, and drove Terrance to Suitland, where he dropped Terrance off near a liquor store.

Special Agent Lawlor left the interview room and called United States Magistrate Judge James E. Kenkel to obtain a warrant to search Dickerson's apartment. Based upon the tape-recorded conversation [Page 7] between Special Agent Lawlor and Judge Kenkel, it is undisputed that Special Agent Lawlor described the circumstances of the robbery, including that the robber used a handgun, carried a bag, requested unmarked bills, and left the scene in a car registered to Dickerson. In addition, Special Agent Lawlor noted that Dickerson had over $550 in cash when picked up, had just that day paid his landlord $1350 to cover back rent, and had admitted that he was near the bank at the time of the robbery. Finally, Special Agent Lawlor explained that he was seeking a telephonic warrant because Dickerson was not under arrest and could easily go home and destroy any evidence of the bank robbery.

Based upon Special Agent Lawlor's sworn statement, Judge Kenkel stated that he was convinced "that there is probable cause to believe at that residence there may be . . . evidence of . . . the bank robbery in question." (J.A. at 69.) In the section of the warrant used to identify the property to be seized, Special Agent Lawlor wrote: "Evidence of the crime of bank robbery." (J.A. at 66.) In the section of the warrant used to identify the time issued, Special Agent Lawlor wrote: "8:50 p.m." /3 (J.A. at 66.) Special Agent Lawlor then called Agent Wenko, who had remained in the vicinity of Dickerson's apartment, to inform him that a warrant had been issued authorizing the agents to search Dickerson's apartment for evidence of the First Virginia Bank robbery. Immediately after being notified about the warrant, Agent Wenko and a team of agents proceeded to search Dickerson's apartment.

After returning to the interview room, Special Agent Lawlor told Dickerson that agents were about to search his apartment. At some point thereafter, Dickerson informed Special Agent Lawlor and Detective Durkin that he wished to make a statement. In his statement, Dickerson admitted to being the getaway driver in a series of bank robberies. Dickerson then identified Jimmy Rochester as the actual bank robber. Of particular importance to this case, Dickerson [Page 8] told the agents that on January 24, 1997, the pair drove to Old Town, Alexandria. Dickerson admitted that he stopped the car near the First Virginia Bank, that Rochester got out of the car, that Rochester returned a short while later and placed something in the trunk, that Rochester got back in the car, and that the pair drove away. Dickerson also told the agents that Rochester gave him a silver handgun /4 and some dye-stained money that Rochester feared the police might find in his apartment. Following these statements, Dickerson was placed under arrest.

As a result of Dickerson's confession, Rochester was apprehended by the police and placed under arrest. At that time, Rochester admitted to robbing eleven banks in Georgia, three banks in Virginia (including the First Virginia Bank in Old Town, Alexandria), four banks in Maryland, and an armored car in Maryland. Of particular importance here, Rochester stated that Dickerson was his getaway driver in each of the Maryland and Virginia bank robberies.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves. The agents also found a small quantity of drugs in plain view. A subsequent warrant-authorized search of Dickerson's Oldsmobile Ciera produced a black leather bag and solvent used to clean dye-stained money.

Based upon his confession, Rochester's statements, and the aforementioned physical evidence discovered during the searches of his apartment and car, Dickerson was indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), on three counts of bank robbery in violation of 18 U.S.C.A. § 2113(a) and (d) (West Supp. 1998), and on three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c) (1) (West Supp. 1998). [Page 9]

On May 19, 1997, Dickerson filed a motion to suppress (1) the statements he made at the FBI Field Office; (2) the evidence found as a result of his statements; (3) the physical evidence obtained during the search of his apartment; and (4) the physical evidence obtained during the search of his car. The Government submitted a brief in opposition to the motion to suppress. Several days later, the Government supplemented its brief in opposition. A hearing on the motion to suppress was held in the United States District Court for

the Eastern District of Virginia on May 30, 1997.

At the suppression hearing, the Government relied exclusively upon the testimony of Special Agent Lawlor. Among other things, Special Agent Lawlor testified that Dickerson was read (and waived) his rights under *Miranda* prior to his confession. Of particular importance here, Special Agent Lawlor testified that Dickerson confessed "shortly after" he obtained the warrant to search Dickerson's apartment. In contrast, Dickerson testified that he confessed prior to being read (and waiving) his *Miranda* rights and about thirty minutes after being informed about the warrant to search his apartment. The advice-of-rights form indicates that Dickerson waived his *Miranda* rights at 9:41 p.m. (J.A. at 72.) After the hearing, the district court asked the parties to submit supplemental briefs in support of their respective positions. The Government filed a supplemental memorandum on June 3, 1997.

On July 1, 1997, the district court issued an Order and Memorandum Opinion. The district court, among other things, suppressed Dickerson's statement implicating himself and Rochester in the First Virginia Bank robbery, finding that it was made while he was in police custody, /5 in response to police interrogation, and without the necessary *Miranda* warnings. In so holding, the district court found that Dickerson's in-court testimony was more credible than that of Special Agent Lawlor. This finding rested, in part, upon the fact that Special Agent Lawlor's testimony - that he read Dickerson his *Miranda* warnings "shortly after" obtaining the warrant - was contradicted by the warrant (issued at "8:50 p.m.") and the advice-of-rights [Page 10] form (executed at "9:41 p.m."). Because the documentary evidence undermined Special Agent Lawlor's credibility /6 (and supported [Page 11] Dickerson's testimony, *i.e.*, he was read his *Miranda* rights about thirty minutes after being told about the warrant), the district court found that "Dickerson was not advised of his *Miranda* rights until after he had completed his statement to the government." (J.A. at 98.)

Although the district court suppressed the statement obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, *e.g.*, the statement made by Rochester identifying Dickerson as the getaway driver. The district court, relying upon this Court's decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997), noted that evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Because Dickerson's statement was voluntary under the Fifth Amendment, the district court concluded that the evidence found as a result thereof was admissible at trial.

The district court did, however, suppress the physical evidence discovered during the search of Dickerson's apartment on January 27, 1997. The district court concluded that the warrant was insufficiently particular in describing the items to be seized. Moreover, the district court concluded that the good-faith exception to the exclusionary rule was inapplicable because the agents "[e]xecuting the [w]arrant [a]cted in [b]ad [f]aith" by relying upon a warrant that was so facially deficient. (J.A. at 91.) [Page 12]

Finally, the district court denied Dickerson's motion to suppress the evidence discovered in the trunk of his car. The district court found that the warrant to search Dickerson's car, unlike the warrant to search his apartment, was sufficiently particular in describing the items to be seized. /7 Moreover, the district court found that the search of the car was supported by the eyewitness accounts of the bank robbery.

On July 15, 1997, the Government filed a motion asking the district court to reconsider its Order suppressing the statements made by Dickerson at the FBI Field Office and the physical evidence found during the search of Dickerson's apartment. The Government's motion included affidavits from Detective Durkin and Agent Wenko, and a statement written by Dickerson while at the FBI Field Office. In addition, the Government argued that because Dickerson's statements were voluntary, they were nonetheless admissible under the mandate of 18 U.S.C.A. § 3501 (West 1985).

Detective Durkin, who was in the interview room with Dickerson at all times, stated in his affidavit that "Dickerson was read his [Page 13] *Miranda* rights before he made th[e] statements" implicating himself and Rochester in the First Virginia Bank robbery. (J.A. at 121.) Detective Durkin explained that after Special

Agent Lawlor returned to the interview room to announce that they were going to search Dickerson's apartment, Special Agent Lawlor immediately departed. According to Detective Durkin, it was not until Special Agent Lawlor returned some time later that they read Dickerson his *Miranda* warnings. In fact, Detective Durkin testified that when Dickerson was read his *Miranda* rights he still denied any involvement in the bank robbery. According to Detective Durkin, it was not until Dickerson was told that agents had found a bait bill from a bank robbery in his apartment that he decided to confess.

Attached to Detective Durkin's affidavit was a hand-written statement that Dickerson made while at the FBI Field Office in which he stated that he "was read [his] rights at 7:30 [p.m.]" /8 (J.A. at 123.) In addition, Dickerson wrote in the statement that he knew "nothing [about] the bank robbery" in question. (J.A. at 123.) Thus, according to his own hand-written note, Dickerson was read his *Miranda* warnings prior to implicating himself and Rochester in the First Virginia Bank robbery. /9 [Page 14]

Finally, Agent Wenko's affidavit contradicted, among other things, the district court's finding that the agents who executed the search of Dickerson's apartment acted in bad faith. Agent Wenko, who was the lead agent during the search of Dickerson's apartment, stated that he was familiar with the specifics of the bank robbery in question and knew what specific evidence to look for. In addition, Agent Wenko stated that he had been investigating bank robberies for seven years and was very familiar with the type of evidence customarily associated with bank robberies, *e.g.*, guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves.

On August 4, 1997, the district court denied the Government's motion for reconsideration. *See United States v. Dickerson*, 971 F. Supp. 1023 (E.D. Va. 1997). Noting that no provision in the Federal Rules of Criminal Procedure governed motions for reconsideration, the district court used the standard set forth in Rule 59(e) of the Federal Rules of Civil Procedure as its guide. *See id.* at 1024. In so doing, the district court rejected the Government's motion for reconsideration upon the ground that the Government failed to establish that "the evidence . . . was unavailable at the time of the hearing." *Id.* This interlocutory appeal followed.

III.

Before determining whether Congress possesses the authority to enact § 3501, we must first consider whether the district court erred in refusing to entertain the Government's motion for reconsideration. /10 (Text continued on page 16) [Page 15] [Page 16]

Although a case of first impression in this Court, our sister circuits review a district court's refusal to reopen a suppression hearing for abuse of discretion. *See, e.g., United States v. Hassan*, 83 F.3d 693, 696 (5th Cir. 1996); *United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992); *United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). We adopt that standard here.

Under an abuse of discretion standard, a reviewing court may not substitute its judgment for that of the district court. *See, e.g., United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995). Indeed, an appeals court may uphold the exercise of a district court's discretion even where it might have ruled differently on the matter in the first instance. Instead, our task is simply to determine whether the district court's exercise of discretion was arbitrary or capricious in light of the governing law and the facts. *See, e.g., id.*

In its motion for reconsideration, the U.S. Attorney's Office asked the district court to reverse its suppression rulings on two grounds. First, the Government presented the district court with additional evidence that corroborated Special Agent Lawlor's testimony concerning when Dickerson was read his *Miranda* warnings. Second, the Government argued that even if Dickerson's confession was elicited in technical violation of *Miranda*, it was nevertheless admissible under 18 U.S.C.A. § 3501 (West 1985). We address each ground in turn.

A.

Relying upon Rule 59(e) of the Federal Rules of Civil Procedure, the district court rejected the Government's motion for reconsideration [Page 17] because the Government failed to establish that "the evidence . . . was unavailable at the time of the hearing." *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997). The Government actually conceded, as it does on appeal, that the evidence forming the basis for its motion was available at the time of the suppression hearing. The Government explains, however, that the evidence was not introduced because (1) it never believed that the district court would find Dickerson more believable than Special Agent Lawlor; and (2) it did not want to burden the district court with cumulative evidence.

As an initial matter, although Rule 59(e) of the Federal Rules of Civil Procedure requires a showing that the evidence supporting a motion for reconsideration was not available at the time of the initial hearing, *see Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993), the Federal Rules of Civil Procedure are not binding in criminal proceedings. As a result, that evidence was available to the movant prior to the suppression hearing does not, as a matter of law, defeat a motion for reconsideration in a criminal case. *See, e.g., United States v. Regilio*, 669 F.2d 1169, 1177 (7th Cir. 1981) (recognizing that "society's interest in admitting all relevant evidence militates strongly in favor of permitting reconsideration").

We also recognize, however, that the district court has a strong interest in controlling its docket and avoiding piecemeal litigation. Thus, when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, as was the case here, the movant must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress before we will determine that a district court abused its discretion in refusing to reconsider its suppression ruling. /11 [Page 18]

Before considering the Government's reasons for failing to introduce the evidence in question, however, we note that it was given numerous opportunities to introduce the evidence prior to the district court's ruling on the suppression motion. Dickerson's motion to suppress was filed on May 19, 1997. On May 23, 1997, the Government filed a response to Dickerson's motion to suppress. Four days later, the Government supplemented its response. A hearing on the motion was held on May 30, 1997. Finally, at the district court's request, the Government was given yet another opportunity to file an additional supplemental memorandum in support of its position on June 3, 1997. At none of these junctures did the Government introduce the two affidavits and the statement.

In light of the ample opportunities the Government had to introduce the evidence in question prior to the district court's ruling on the motion to suppress, its articulated reasons for failing to do so ring hollow. First, the Government contends that it never believed that the district court would find Dickerson more credible than Special Agent Lawlor. Even if this explanation was tenable prior to the suppression hearing, Special Agent Lawlor's testimony on the primary issue in dispute, *i.e.*, whether Dickerson was read his *Miranda* warnings prior to his confession, was completely undermined by the Government's own documentary evidence, which supported Dickerson's version of events. After the hearing, therefore, the Government should have been firmly disabused of any misconceptions concerning whom the district court would find more credible. Because the Government was given the opportunity to file a supplemental memorandum after the hearing, the Government's failure to introduce the affidavits of Detective Durkin and Agent Wenko and the statement written by Dickerson cannot be explained by its first justification.

Next, the Government contends that it did not want to burden the district court with cumulative evidence. What the Government means by cumulative evidence is not entirely clear. Because every additional piece of evidence offered is, by definition, cumulative, cumulative evidence is not bad *per se*. Indeed, under the Federal Rules of Evidence it is the "needless presentation of cumulative evidence" that is to be avoided. /12 Fed. R. Evid. 403. With that understanding, the Government's [Page 19] argument necessarily assumes that Special Agent Lawlor's testimony should have been sufficient and that any additional evidence would, in fact, be needlessly cumulative. For the reasons stated above, however, the Government should have known after the hearing that additional evidence was not needlessly cumulative, but absolutely necessary. /13

In any event, why the Government would consider the statement written by Dickerson - in which he admits that he was read his *Miranda* warnings prior to implicating himself in a series of bank robberies - to be needlessly cumulative on the pivotal question of whether he was read his *Miranda* warnings prior to implicating himself in a series of bank robberies is difficult to understand. Evidence that is so probative that it would likely change the mind of the factfinder is not needlessly cumulative. *Cf.* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5220, at 306 (1978) (noting similar principle under Rule 403). [Page 20]

In sum, because the district court gave the Government the opportunity to introduce the affidavits of Detective Durkin and Agent Wenko and Dickerson's hand-written statement after the suppression hearing, we conclude that the Government's failure to do so cannot adequately be explained by its proffered reasons. Accordingly, we cannot say that the district court abused its discretion in denying the Government's motion for reconsideration based upon its refusal to consider evidence that was in the Government's possession at the time of the initial hearing.

B.

Because "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 116 S. Ct. 2035, 2047 (1996), we must address the Government's second proffered ground for reconsideration of the suppression ruling, namely whether § 3501, rather than *Miranda*, governs the admissibility of Dickerson's confession.

1.

Whether § 3501 or *Miranda* governs the admissibility of Dickerson's confession ultimately turns on the answers to two questions. Does § 3501 purport to supersede the rule set forth by the Supreme Court in *Miranda*? If it does, does Congress possess the authority legislatively to overrule *Miranda*? Prior to addressing these questions, however, we feel compelled to respond to the dissent's assertion that the question of § 3501's applicability is not properly before us.

Although raised by the Government in its motion for reconsideration, the applicability of § 3501 was not briefed by the Government on appeal. /14 We note, however, that this was no simple oversight. The [Page 21] United States Department of Justice took the unusual step of actually prohibiting the U.S. Attorney's Office from briefing the issue. To be sure, this was not an isolated incident. Over the last several years, the Department of Justice has not only failed to invoke § 3501, it has affirmatively impeded its enforcement.

For example, in *Davis v. United States*, 512 U.S. 452 (1994), which involved the defendant's attempt to suppress an incriminating statement [Page 22] made after an ambiguous request for counsel, the Department of Justice expressly declined to take a position on the applicability of § 3501. *See id.* at 457 n.*. As a result, the majority opinion declined to consider the issue. *See id.* (declining to reach issue because "we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position"). Justice Scalia, in a concurring opinion, chided the Department of Justice for its failure to invoke § 3501:

> The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of *"Miranda"* issues that might be entirely irrelevant under federal law. Worse still, it may have produced - during an era of intense national concern about the problem of run-away crime - the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this.

Id. at 465 (citations omitted). Justice Scalia further questioned whether the Department of Justice's failure to invoke § 3501 was "consistent with the Executive's obligation to 'take Care that the Laws be faithfully

executed. '" *Id.* (quoting U.S. Const. Art. II, § 3).

Over the past few years, career federal prosecutors have tried to invoke § 3501 in this Court only to be overruled by the Department of Justice. /15 In March of 1997, for example, the U.S. Attorney's [Page 23] Office in Alexandria, Virginia, appealed the suppression of a statement that the district court found was obtained in technical violation of *Miranda*. *See United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998). In its brief, the U.S. Attorney's Office urged this Court to reverse the district court on the basis of § 3501. The Department of Justice, however, ordered the U.S. Attorney's Office to withdraw its brief. In its place, a brief without any reference to § 3501 was filed. As a result, the Washington Legal Foundation and United States Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond filed an amicus brief urging this Court to consider the admissibility of Sullivan's confession under § 3501. Because we ultimately concluded that Sullivan was not in custody for *Miranda* purposes when the incriminating statements were made, we had no occasion to address the applicability of § 3501. *See id.* at 134 n.*.

In June of 1997, this Court issued an opinion upholding the suppression of a confession obtained in technical violation of *Miranda*. *See United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997) (unpublished). Although the United States did not seek rehearing, the Washington Legal Foundation and the Safe Streets Coalition moved this Court for leave to proceed as amici curiae. In their motion, the putative amici took the Government to task for failing to assert the applicability of § 3501. As a result, we ordered the Department of Justice to address the effect of § 3501 on the admissibility of Leong's confession. In response, Attorney General Janet Reno, although purporting to follow the advice of her career prosecutors in other matters, notified Congress that the Department of Justice would not defend the [Page 24] constitutionality of § 3501, *see* 2 U.S.C.A. § 288k(b) (West 1997) (requiring the Department of Justice to notify the United States Congress whenever it will not defend the constitutionality of a federal statute), and filed with this Court a brief to the same effect. /16

Against this background, the Government's failure to raise the applicability of § 3501 on appeal in this case does not come as a surprise. Of even greater importance, neither does it prevent us from considering the applicability of § 3501 on appeal. Even where the parties abdicate their responsibility to call relevant authority to this Court's attention, *cf.* Va. Code Prof. Resp. 7-20, they cannot prevent us from deciding the case under the governing law simply by refusing to argue it, *see United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993). /17 Indeed, it is now well established that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young v. United States*, 315 U.S. 257, 259 (1942). [Page 25]

The dissent contends that "we are faced with essentially the same situation that the Supreme Court confronted in *Davis* when it refused to take up § 3501." *Post* at 49. We disagree. Although the Supreme Court declined *sua sponte* to consider the applicability of § 3501 in *Davis*, 512 U.S. at 457 n.*, that decision was influenced by prudential concerns not present here, *id.* at 465 (Scalia, J., concurring) (noting that the Court's decision not to consider the applicability of § 3501 was influenced by prudential concerns, rather than by statutory constraints on the Supreme Court's jurisdiction). As a general matter, "a court should avoid deciding a constitutional question when it can dispose of a case on another basis." *Jimenez v. BP Oil, Inc.*, 853 F.2d 268, 270 (4th Cir. 1988) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Having determined that the defendant's ambiguous reference to an attorney during a custodial interrogation was not a request for counsel for purposes of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), *see Davis*, 512 U.S. at 459, the Court had no reason to consider whether the defendant's confession was also admissible under the mandate of § 3501, especially because the Department of Justice had expressly declined to take a position on the provision's constitutionality, *see id.* at 457 n.*. Dickerson's confession, in contrast, was obtained in violation of *Miranda*. Thus, unlike the situation in *Davis*, we cannot avoid deciding the constitutional question associated with § 3501. Moreover, and again unlike the situation in *Davis*, the Department of Justice has now taken the position that § 3501 is unconstitutional. *See* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997) (notifying Congress that the Department of Justice will not defend the constitutionality of the statute). As a result, the specific prudential concerns that animated the Supreme Court's decision not to consider the applicability of

§ 3501 in *Davis* are simply not present here.

Furthermore, the primary reason for the Supreme Court's general reluctance to consider arguments not raised is not applicable to inferior federal courts such as this one. The Supreme Court "sits as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927). Thus, it generally will not consider issues "not pressed or passed upon below." *Id.*; *see also Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (declining to address issue that was not presented to either the District Court or the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where [Page 26] issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). In contrast, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also United States Nat'l Bank of Or.*, 508 U.S. at 445-48 (stating that it was proper for the Court of Appeals to consider whether the controlling statute had been repealed despite the parties' failure to raise the issue).

Because the Department of Justice will not defend the constitutionality of § 3501 - and no criminal defendant will press the issue - the question of whether that statute, rather than *Miranda*, governs the admission of confessions in federal court will most likely not be answered until a Court of Appeals exercises its discretion to consider the issue. Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. As a result, we are required to consider the issue now. *Cf. Davis*, 512 U.S. at 464 (Scalia, J., concurring) (noting that the "time will have arrived" to consider the applicability of § 3501 the next time "a case that comes within the terms of th[e] statute is . . . presented to us"); *see also* Eric D. Miller, comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029 (1998) (answering question in the affirmative).

a.

Having determined that the issue is properly before the panel, we must first determine whether § 3501 purports to supersede the rule set forth by the Supreme Court in *Miranda*. To do so, a brief history of the rules governing the admissibility of confessions before and after *Miranda* is in order. *See generally Development in the Law Confessions*, 79 Harv. L. Rev. 935 (1966) [hereinafter *Developments*].

"At early common law, confessions were admissible at trial without restrictions." *Id.* at 954; *see also McCormick's Handbook on the Law of Evidence* § 147, at 313 (1972) (Edward W. Cleary, ed., West 2d ed. 1972) (citing 3 Wigmore, Evidence § 818 (3d ed. 1940)). In the latter part of the eighteenth century, however, courts began to recognize [Page 27] that certain confessions were not trustworthy. *See, e.g., The King v. Rudd*, 168 Eng. Rep. 160 (K.B. 1783) (holding that "no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear"). Although several tests were developed to determine whether a confession was trustworthy, a confession was generally thought to be reliable only if made voluntarily. *See, e.g., Regina v. Garner*, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852).

In *Hopt v. Utah*, 110 U.S. 574 (1884), the Supreme Court specifically adopted the common law rule that a confession was reliable, and therefore admissible, if it was made voluntarily. *Id.* at 584-85 (holding that a confession was voluntary if not induced by threat or promise) (citing *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852)); *see also Pierce v. United States*, 160 U.S. 355, 357 (1896) (same). In subsequent cases, the Supreme Court applied the common law test of voluntariness to confessions. *See* Developments, *supra*, at 959. In so doing, the Court rejected the argument that a confession was involuntary simply because the suspect was in custody. *See Sparf v. United States*, 156 U.S. 51, 55 (1895). Similarly, in *Wilson v. United States*, 162 U.S. 613 (1896), the Supreme Court specifically held that the failure to warn a suspect of his right to remain silent and of his right to counsel did not render a confession involuntary. *Id.* at 624.

In *Bram v. United States*, 168 U.S. 532 (1897), the Supreme Court asserted, for the first time, a constitutional basis for its requirement that a confession be made voluntarily. *Id.* at 542 (stating that whether a confession is voluntary "is controlled by that portion of the fifth amendment . . commanding that no person `shall be compelled in any criminal case to be a witness against himself '" (quoting U.S. Const. amend. V.)). According to the Court, the Fifth Amendment privilege against self-incrimination "was but a crystallization" of the common law rule that only voluntary confessions are admissible as evidence. *Id.* Although the Supreme Court - prior to *Miranda* - would eventually place less reliance upon the approach taken in *Bram*, *see, e.g., United States v. Carignan*, 342 U.S. 36, 41 (1951) (expressing doubt about "[w]hether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from [Page 28] a rule that forced confessions are untrustworthy" (footnote omitted)), the Supreme Court in *Brown v. Mississippi*, 297 U.S. 278 (1936), invoked another constitutional basis for its requirement that a confession be made voluntarily: the Due Process Clause. *Id.* at 285-86. Thereafter, a confession was admissible only if voluntary within the meaning of the Due Process Clause. *See, e.g., Haynes v. Washington*, 373 U.S. 503 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944); *Chambers v. Florida*, 309 U.S. 227 (1940).

Thus, prior to *Miranda*, the rule governing the admissibility of confessions in federal court - if not the rule's justification - remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily. *See, e.g., Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (noting that prior to *Miranda*, "voluntariness *vel non* was the touchstone of admissibility of confessions"); *Miranda v. Arizona*, 384 U.S. 436, 506-07 (1966) (Harlan, J., dissenting) (noting that voluntariness has been the test for admitting confessions since the earliest days of the Republic). Indeed, in *Lisenba v. California*, 314 U.S. 219 (1941), the Supreme Court specifically referred to "voluntariness" as the federal test for determining the admissibility of confessions. *Id.* at 236.

Such was the stage in 1966 when the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court announced a new analytical approach to the admissibility of confessions. Specifically, the Court rejected a case-by-case determination of whether a confession was voluntary. Instead, the Court held that any statement stemming from the custodial interrogation of a suspect would be presumed involuntary, and therefore inadmissible, unless the police first provided the suspect with four warnings. /18 Although the Court relied upon its prior decision in *Bram v. United States*, 168 U.S. 532 (1897) (holding that voluntariness is required by the Fifth Amendment), for support, *Miranda*, 384 U.S. at 461-62, the Court acknowledged that the Constitution requires no "particular [Page 29] solution for the inherent compulsions of the interrogation process," *id.* at 467, and left open the opportunity for the States and Congress to "develop their own safeguards for the privilege, so long as they are fully as effective as [the four warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it," *id.* at 490. The Court held that until that time, the warning "safeguards must be observed." *Id.* at 467.

Congress enacted § 3501 just two years after the Supreme Court decided *Miranda*. When interpreting an act of Congress, "our inquiry begins with an examination of the language used in the statute." *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996) (citing *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir.), *cert. denied*, 117 S. Ct. 54 (1996)), *cert. denied*, 117 S. Ct. 738 (1997). Section 3501 provides as follows:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the

> circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant [Page 30] had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
>
> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any seifincriminating statement made or given orally or in writing. [Page 31]

18 U.S.C.A. § 3501. The above-quoted statutory language is plain. Congress has provided that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court. *See, e.g.*, Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 545 (5th ed. 1996) (noting that "the intent of Congress was to `overrule ' *Miranda* in favor of a return to the `voluntariness' standard").

That Congress wished to return to a case-by-case determination of whether a confession was voluntarily given is undeniable. *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. Although certainly not dispositive, it is worth noting that the Senate Report accompanying § 3501 specifically stated that "[t]he intent of the bill is to reverse the holding of *Miranda v. Arizona*, 384 U.S. 436 (1966)." *Id.* at 2141. Indeed, although acknowledging that "[t]he bill would also set aside the holdings of such cases as *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957)," *id.*, the Report stated that *Miranda* "is the case to which the bill is directly addressed," *id.* Senate opponents likewise recognized that § 3501, by making voluntariness the sole criterion for the admissibility of confessions, was meant to repeal the irrebuttable presumption created by *Miranda*. *See id.* at 2210-11 (noting that § 3501 was "squarely in conflict with the Supreme Court's decision in *Miranda v. Arizona*").

Similarly, both proponents and opponents of § 3501 in the House of Representatives noted that the statute was meant to overrule the irrebuttable presumption created by *Miranda*. *See, e.g.*, 114 Cong. Rec. 16,066

(1968) (statement of Rep. Celler); *id.* at 16,074 (statement of Rep. Corman); *id.* at 16,278 (statement of Rep. Poff); *id.* at 16,279 (statement of Rep. Taylor); *id.* at 16,296 (statement of Rep. Randall); *id.* at 16,297-98 (statement of Rep. Pollock).

Although Congress enacted § 3501 with the express purpose of restoring voluntariness as the test for admitting confessions in federal court, it is important to note that Congress did not completely abandon the central holding of *Miranda, i.e.*, the four warnings are important [Page 32] safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C.A. § 3501(b). Congress simply provided that the failure to administer the warnings to a suspect would no longer create an irrebuttable presumption that a subsequent confession was involuntarily given. *See id.* (providing that the *Miranda* warnings are not dispositive on the issue of voluntariness).

b.

Based on the statutory language alone, it is clear that Congress enacted § 3501 with the express purpose of returning to the pre- *Miranda* case-by-case determination of whether a confession was voluntary. We now turn to our next inquiry: Does Congress possess the authority to supersede the irrebuttable presumption created in *Miranda* that any unwarned statement to the police is involuntary, and therefore inadmissible?

Interestingly, much of the scholarly literature on *Miranda* deals not with whether Congress has the legislative authority to overrule the presumption created in *Miranda*, but whether it should. *Miranda* 's opponents, like Professor Paul Cassell, contend that thousands of violent criminals escape justice each year as a direct result of *Miranda*. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U. L. Rev. 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996). In contrast, its proponents, like Professor Stephen Schulhofer, argue that *Miranda* has had little impact on law enforcement's ability to obtain confessions. *See, e.g.*, Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987). This debate, however, is one we need not enter. Whether Congress should overrule *Miranda* tells us nothing about whether it could. More importantly, it is not our role to answer that question. It is the province of the judiciary to determine what the [Page 33] law is, not what it should be. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Court recently held that Congress does not possess the legislative authority to supersede a Supreme Court decision construing the Constitution. *See id.* at 2172 (refusing to enforce federal statute establishing more narrow test for violation of the Free Exercise Clause than prior test established by Supreme Court). On the other hand, Congress possesses the legislative authority to overrule judicially created rules of evidence and procedure that are not required by the Constitution. *See Palermo v. United States*, 360 U.S. 343, 345-48 (1959) (upholding federal statute establishing more narrow disclosure of *Jencks* material than prior rule established by Supreme Court); *see also Carlisle v. United States*, 517 U.S. 416, 426 (1996) (noting that the federal courts may formulate rules of evidence and procedure so long as they do not conflict with an Act of Congress); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (upholding statute altering the evidentiary standard for expatriation proceedings established by the Supreme Court because prior standard created by the Court was not required by "the Constitution"). In fact, the power of the Supreme Court to prescribe nonconstitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11 (citing *Funk v. United States*, 290 U.S. 371, 382 (1933), and *Gordon v. United States*, 344 U.S. 414, 418 (1953)).

Whether Congress has the authority to enact § 3501, therefore, turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. If it is, Congress lacked the authority to enact §

3501, and *Miranda* continues to control the admissibility of confessions in federal court. *See City of Boerne*, 117 S. Ct. at 2172. If it is not required by the Constitution, then Congress possesses the authority to supersede *Miranda* legislatively, and § 3501 controls the admissibility of confessions in federal court. *See Palermo*, 360 U.S. at 353 n.11.

Using the same analysis, several federal courts have found that § 3501 superseded the rule set forth in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). *See United States v. Pugh*, 25 F.3d 669, 675 (8th Cir. 1994) (holding [Page 34] that § 3501 superseded the *McNabb/Mallory* rule); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir. 1991) (noting that § 3501, rather than *McNabb/Mallory*, governs the admissibility of confessions in federal court). In particular, the Eighth and Sixth Circuits first ascertained whether the rule set forth by the Supreme Court in *McNabb* and *Mallory* was required by the Constitution. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39. In *McNabb*, the Supreme Court exercised its supervisory power over the federal courts to exclude all incriminating statements, including voluntary confessions, obtained during an unreasonable delay between a defendant's arrest and initial appearance. *See* 318 U.S. at 343-44. In *Mallory* the Supreme Court affirmed the holding of *McNabb* under Rule 5(a) of the Federal Rules of Criminal Procedure. *See* 354 U.S. at 455-56. Finding that the rule set forth in *McNabb* and *Mallory* was not required by the Constitution, the Eighth and Sixth Circuits had little difficulty concluding that Congress possessed the legislative authority to overrule both cases. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39. /19

We begin our analysis then, with the Supreme Court's decision in *Miranda*. Several passages in Chief Justice Warren's opinion for the Court suggest that the warnings safeguard rights guaranteed by the [Page 35] Constitution. *See, e.g., Miranda*, 384 U.S. at 490 (noting that the privilege against self-incrimination is guaranteed by the Constitution). Surprisingly, the sixty-page opinion does not specifically state the basis for its holding that a statement obtained from a suspect without the warnings would be presumed involuntary. The Court strongly suggested, however, that the basis for the rule was identical to that set forth in *McNabb* and *Mallory*. *See id.* at 463. In particular, just as the "supervisory" rule set forth in *McNabb* and *Mallory* permitted the Court to avoid the constitutional issues associated with federal interrogations, *see id.*, the rule set forth in *Miranda* would allow the Court to avoid the constitutional issues associated with state interrogations, *see id.*

Although the Court failed to specifically state the basis for its holding in *Miranda*, it did specifically state what the basis was not. At no point does the Court refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, *id.* at 467, disclaimed any intent to create a "constitutional straightjacket," *id.*, repeatedly referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490.

Since deciding *Miranda*, the Supreme Court consistently (and repeatedly) has referred to the warnings as "prophylactic," *New York v. Quarles*, 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *see also Davis v. United States*, 512 U.S. 452, 457-58 (1994) (referring to *Miranda* warnings as "a series of recommended procedural safeguards" (internal quotation marks omitted)); *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993) (acknowledging that "*Miranda* 's safeguards are not constitutional in character"); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (noting that the *Miranda* warnings are not required by the Constitution); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (noting that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (noting that the *Miranda* exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation"); *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring) (noting that the [Page 36] Court in *Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution").

One of the first opinions construing *Miranda* was *Harris v. New York*, 401 U.S. 222 (1971). In *Harris*, the defendant, charged with selling heroin, made several statements to the police prior to receiving his *Miranda*

warnings. *See id.* at 223-24. At trial, the defendant took the stand in his own defense. *See id.* at 223. During cross-examination, he was asked whether he had previously made any statements to the police that contradicted his direct testimony. *See id.* Although not admissible as substantive evidence, the Court held, per Chief Justice Burger, that the statements in question could be admitted for purposes of impeaching his credibility because, although obtained in technical violation of *Miranda*, the statements were made voluntarily. *See id.* at 224-25; *cf. Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (holding that involuntary statements, as opposed to statements made in technical violation of *Miranda*, could not even be admitted for impeachment purposes).

In *Tucker*, the Supreme Court was asked to apply the "tainted fruits" doctrine from *Wong Sun v. United States*, 371 U.S. 471 (1963), to the testimony of a witness whose identity was discovered as the result of a statement obtained from the defendant in violation of *Miranda*. *See* 417 U.S. at 436-37. In declining to extend the "tainted fruits" doctrine to the facts in *Tucker*, the Court noted that the unwarned questioning did not abridge the defendant's Fifth Amendment privilege, "but departed only from the prophylactic standards later laid down by this court in *Miranda* to safeguard that privilege." 417 U.S. at 445-46. Because the defendant's constitutional rights were not infringed, the Court in *Tucker* determined that the "fruit of the poisonous tree" doctrine did not apply. *Id.* at 445-46 & n.19.

In *Quarles*, the Supreme Court was asked by the State of New York to recognize an emergency exception to *Miranda*. *See* 467 U.S. at 649. In that case, a young woman told two police officers that she had just been raped, that her assailant had just entered a nearby store, and that he was carrying a gun. After entering the store the officers quickly spotted the defendant. After a short chase, the defendant was caught and searched. Because he was wearing an empty shoulder holster, the arresting officer asked him, prior to reading him his *Miranda* [Page 37] warnings, where the gun was located. *See id.* at 651-52. The defendant nodded in the direction of some empty cartons and stated, "the gun is over there." *Id.* at 652. Although obtained in technical violation of *Miranda*, the Government sought to introduce the defendant's statement in its case-in-chief. In recognizing an emergency exception to *Miranda*, the Supreme Court relied exclusively upon the fact that a violation of *Miranda* was not necessarily a violation of the Constitution. *See id.* at 654 (stating that "[t]he prophylactic *Miranda* warnings . . . are `not themselves rights protected by the Constitution '" (quoting *Tucker*, 417 U.S. at 444)); *see also* Saltzburg & Capra, *supra*, at 555-56 ("[I]f the *Miranda* safeguards were constitutionally required, then presumably any confession obtained in violation of them would have to be excluded - even if the officer was faced with a situation where giving the safeguards may have posed a threat to public safety.").

When presented with another opportunity to extend the *Wong Sun* "tainted fruits" doctrine, the Supreme Court in *Oregon v. Elstad*, 470 U.S. 298 (1985), once again declined the invitation to do so. In *Elstad*, two officers went to the defendant's home with a warrant for his arrest. *See id.* at 300. After executing the warrant, the officers questioned the defendant about his role in the burglary of a neighbor's house. *See id.* at 301. As a result of the interrogation, the defendant confessed to the burglary. *See id.* The defendant was then escorted to the police station where the officers advised him for the first time of his *Miranda* rights. After waiving his rights, the defendant once again confessed to the burglary. *See id.* Later, the defendant sought to suppress his second confession as the "fruit of the poisonous tree," arguing that it was obtained only as the result of his first confession that was made in violation of *Miranda*. *See id.* at 302. The *Elstad* majority, however, held that the "tainted fruits" doctrine did not apply to the second confession for the same reasons the doctrine did not apply in *Tucker*. *See id.* at 308. Specifically, the Court held that "[s]ince there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a *constitutional* violation must be suppressed." *Id.* (emphasis added).

Of particular importance here, the Court in *Elstad* made the following observation about *Miranda:* [Page 38]

> The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda* 's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.
>
> But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.

Id. at 306-07 (internal footnotes and citations omitted).

In light of the foregoing cases, it is certainly "well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation." *United States v. Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997) (citing Supreme Court cases); *see also Correll v. Thompson*, 63 F.3d 1279, 1290 (4th Cir. 1995) (holding that "a technical violation of *Miranda* [is not necessarily] a Fifth Amendment violation"). As a consequence, the irrebuttable presumption created by the Court in *Miranda* - that a confession obtained without the warnings is presumed involuntary - is *a fortiori* not required by the Constitution. /20 [Page 39]

Accordingly, Congress necessarily possesses the legislative authority to supersede the conclusive presumption created by *Miranda* pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959); *cf.* Alfredo Garcia, *Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?*, 10 St. Thomas L. Rev. 461, 461-65, 479 (1998) (concluding that § 3501 "overruled *Miranda*" but arguing that *Miranda* was already dead). /21

It is worth recalling that Congress not only acted in response to the Court's invitation, *see Miranda*, 384 U.S. at 490 (inviting Congress and the States "to develop their own safeguards for [protecting] the privilege"), but that the Court in *Miranda* had acted in the absence of a relevant Act of Congress. It is well established that the Court's power to prescribe nonconstitutional "rules of procedure and evidence [Page 40] for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11. Thus, just as the Court was free to create an irrebuttable presumption that statements obtained without certain procedural safeguards are involuntary, Congress was free to overrule that judicially created rule.

To be sure, the *Miranda* warnings were meant to safeguard the Fifth Amendment privilege against self-incrimination. Indeed, under § 3501 any statement obtained in violation of the privilege must be suppressed. Thus, we cannot say that Congress's decision to eliminate the irrebuttable presumption created by *Miranda* lessens the protections afforded by the privilege. Indeed, the Court has recognized that *Miranda* 's irrebuttable presumption goes beyond what is required to protect the privilege. As a result, even "patently *voluntary* statements . . . must be excluded." *Elstad*, 470 U.S. at 307. In enacting § 3501, Congress simply recognized the need to offset the harmful effects created by *Miranda* 's irrebuttable presumption. /22 *Cf. Sandstrom v.* [Page 41] *Montana*, 442 U.S. 510, 523 (1979) (recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases). No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities.

Finally, lest there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings. As noted above, those warnings are among the factors a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C.A. § 3501(b). Indeed, federal courts rarely find confessions obtained in technical compliance with *Miranda* to be involuntary under the Fifth Amendment. *Cf. Elie*, 111 F.3d at 1143 (noting "that very few incriminating statements, custodial or otherwise, are held to be involuntary" (internal

quotation marks omitted)). Thus, providing [Page 42] the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness.

In the end, and after an exhaustive review of the relevant authority, we are convinced that § 3501 - enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts - is constitutional. We are reassured in our conclusion by the fact that our dissenting colleague, after examining all of the relevant authority at his disposal, has been unable to conclude differently. At best, the dissent can but pose a rhetorical question concerning the constitutionality of § 3501. *See ante* note 21. Apparently, all of the relevant authority of which the dissent is aware supports the conclusion we reach today. As a consequence, we have no difficulty holding that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*.

2.

Having concluded that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, our next step ordinarily would be to remand the case for a determination of whether Dickerson's confession was voluntary. That is unnecessary in this case, however, because the district court has already made that finding.

Although the district court suppressed the statements obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, *e.g.*, the statement made by Rochester identifying Dickerson as the getaway driver. In making this determination, the district court stated that it was bound by this Court's decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997). *See United States v. Dickerson*, 971 F. Supp. 1023, 1024 n.1 (E.D. Va. 1997). In *Elie*, we held that evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Therefore, by declining to suppress the evidence found as a result of Dickerson's unwarned statements, the district court necessarily found that Dickerson's statements were voluntary under the Fifth Amendment. [Page 43]

During oral argument, Dickerson's counsel contended that the district court erred in finding that the statements in question were voluntary for purposes of the Fifth Amendment. The district court's finding on this matter, however, is currently unreviewable. *See, e.g., United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994) (noting that the denial of a motion to suppress is not an appealable final order).

IV.

On appeal, the Government also contends that the district court erred in suppressing the fruits of the warrant-authorized search of Dickerson's apartment. The district court concluded that the warrant was insufficiently particular in describing the items to be seized. Moreover, the district court concluded that the agents executing the warrant could not have acted in good-faith because the warrant was facially deficient. We address these two rulings in turn.

A.

The warrant in question was obtained by Special Agent Lawlor via the telephone pursuant to Rule 41(c)(2) of the Federal Rules of Criminal Procedure. In his sworn oral testimony to Judge Kenkel, Special Agent Lawlor described the circumstances of the bank robbery, including that the robber used a handgun, carried a bag, requested unmarked bills, and left the scene in a car registered to Dickerson. In the section of the warrant used to identify the property to be seized, Special Agent Lawlor wrote: "Evidence of the crime of bank robbery." Whether that description, coupled with the description contained in Special Agent Lawlor's oral testimony, is sufficiently particular to pass constitutional scrutiny is a legal issue subject to de novo review. *See United States v. Hyppolite*, 65 F.3d 1151, 1156 (4th Cir. 1995).

The Fourth Amendment provides that a search warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Supreme Court has identified two important purposes underlying the particularity requirement: (1) preventing general searches, and (2) ensuring that the executing officer is able to distinguish between those items which are to be [Page 44] seized and those that are not. *See Marron v. United States*, 275 U.S. 192, 196 (1927).

The Government argues that the warrant neither authorized an improper general search nor left to the discretion of the agents executing the warrant what to seize. Specifically, the Government contends that the warrant directed the agents to search for evidence of a particular crime - bank robbery - that tends to generate quite distinctive evidence, *e.g.*, guns, masks, bait money, dye-stained bills and clothes, carrying bags. The test for the necessary particularity of a search warrant is "a pragmatic one: The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved." *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir. 1979) (internal quotation marks omitted).

Some courts uphold warrants that identify the items to be seized as "evidence of [specific crime]" only "where a more precise description was not possible in the circumstances." *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (citing cases). Here, the Government admits, as it must, that it could have been more precise, but argues that this Court has routinely upheld warrants directing the police to search for evidence of a particular crime. *See* Appellant's Br. at 36-37 (citing *United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986), and *United States v. Ladd*, 704 F.2d 134 (4th Cir. 1983)).

As the Government correctly notes, the law of this Circuit does allow some discretion to the officers executing a search warrant, so long as the warrant at least minimally "confines the executing officers' discretion by allowing them to seize only evidence of a particular crime." *Fawole*, 785 F.2d at 1144. For example, in *Ladd* we upheld a warrant directing the police to seize all property relating to "the smuggling, packing, distribution, and use of controlled substances," as satisfying fully the particularity requirement. 704 F.2d at 136. Indeed, the panel in *Ladd* specifically held that "[m]ore specificity is not required by the Constitution." *Id.; see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.6(d), at 567 & n.81 (3d ed. 1996) (noting that "[s]ometimes a warrant will not attempt to describe instrumentalities except by reference to the criminal conduct in which they have been used") (collecting cases). [Page 45]

As explained by the Second Circuit in *George*, a warrant authorizing a search for evidence relating to "a broad criminal statute or general criminal activity" such as "wire fraud," "fraud," "conspiracy," or "tax evasion," is overbroad because it "provides no readily ascertainable guidelines for the executing officers as to what items to seize." 975 F.2d at 76. In contrast, a warrant authorizing a search for evidence relating to "a specific illegal activity," such as "narcotics," or "theft of fur coats" is sufficiently particular. *Id.* (citing cases). The warrant in the instant case limited the agents' search to evidence relating to the commission of a particular crime: bank robbery. Bank robbery is a specific illegal activity that, as the Government notes, generates quite distinctive evidence. Though certainly broad in its description, we cannot say that the warrant failed to provide that degree of specificity required by the precedent of this Court.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves. /23 Rather than conducting an impermissible fishing expedition, it is clear that the agents conducting the search only seized those items reasonably associated with the crime of bank robbery. Thus, it is evident that the warrant was sufficiently definite so that the agents executing it were able to identify the property sought with reasonable certainty. As a consequence, we conclude that "evidence of the crime of bank robbery" adequately distinguishes between those items which are to be seized and those which are not. *See Marron*, 275 U.S. at 196.

In sum, the nature of a bank robbery is such that the evidence thereof is reasonably subject to identification. Since "[t]he degree of specificity required when describing the goods to be seized . . . var[ies] according to the . . . type of items involved," *Torch*, 609 F.2d at 1090, we have little difficulty concluding that the warrant was sufficiently particular in describing the items to be seized.

B.

Moreover, even if we assume that the warrant was not sufficiently [Page 46] particular in describing the items to be seized, we nevertheless would conclude that the evidence obtained during the search of Dickerson's apartment was admissible pursuant to the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 913 (1984). In deciding whether the good faith exception applies, this Court must consider "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. This inquiry is objective in nature, depending upon the understanding of a reasonable officer in light of the totality of the circumstances. *See Hyppolite*, 65 F.3d at 1156.

In light of the totality of the circumstances, we conclude that the warrant in this case was not so facially deficient as to preclude reasonable reliance upon it. First, the warrant specified that the items to be seized consisted of evidence associated with bank robbery. Thus, it did not fail to provide the searching officers any guidance whatsoever as to the subject of the search.

Second, this Court considers the knowledge of the searching officers in assessing the objective reasonableness of reliance upon a warrant. *See United States v. Curry*, 911 F.2d 72, 78 (8th Cir. 1990) (noting that "in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position would have possessed"). Agent Wenko, who was the lead agent during the search of Dickerson's apartment, was familiar not only with the specifics of the bank robbery in question, but, perhaps as important, had been investigating bank robberies for seven years and thus was very familiar with the type of evidence to look for *(e.g.*, guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves).

For the foregoing reasons, we conclude that the district court erred in finding that the agents could not have acted in good-faith reliance on the warrant.

V.

In conclusion, we find that the admissibility of confessions in federal court is governed by 18 U.S.C.A. § 3501 (West 1985), rather than [Page 47] *Miranda*, that the warrant was sufficiently particular in describing the items to be seized, and that the officers executing the warrant acted in good faith. Accordingly, the district court's order suppressing the statements Dickerson made at the FBI Field Office and the physical evidence obtained during the search of his apartment is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

FOOTNOTES

/1 The district court also suppressed the physical evidence obtained during the search of Dickerson's apartment because the warrant was not sufficiently particular in describing the items to be seized. Finding that the warrant was sufficiently particular in describing the items to be seized, *see post* part IV.A, or, in the alternative, that the officers executing the warrant acted in good faith, *see post* part IV.B, we reverse that ruling also.

/2 Dickerson testified at the suppression hearing that he did not feel he had a choice about whether to accompany the agents to the field office.

/3 Because the warrant was obtained over the telephone, Judge Kenkel was not able to sign the warrant personally. Instead, Judge Kenkel instructed Special Agent Lawlor to sign the Judge's name, followed by a slash and Special Agent Lawlor's name, on the line used to identify the name of the judicial officer

authorizing the warrant.

/4 Dickerson told Special Agent Lawlor and Detective Durkin that he had the handgun in question in his hand when the agents knocked on the door of his apartment.

/5 The Government does not challenge on appeal the district court's finding that Dickerson was in police custody for *Miranda* purposes when he was initially brought to the FBI Field Office.

/6 The documentary evidence, which clearly contradicted Special Agent Lawlor's testimony, was not the only reason the district court gave for finding that Special Agent Lawlor's testimony lacked credibility. First, Special Agent Lawlor testified that when he knocked on Dickerson's door he did not have his gun drawn and "didn't expect one way or the other" whether his colleagues would have their guns drawn. The district court found it "simply not credible for a well-trained Special Agent of the FBI to assert that" he did not expect his colleagues to have their weapons drawn when confronting a suspect in an armed bank robbery. (J.A. at 95 n.7.) Second, Special Agent Lawlor told Judge Kenkel that a telephonic warrant was necessary because Dickerson was not under arrest and could easily go home and destroy any evidence of the bank robbery. The district court concluded that "[i]t strains credibility to believe that the FBI would simply release" Dickerson. (J.A. at 90 n.3.) Third, Special Agent Lawlor testified that Judge Kenkel instructed him to write "evidence of the crime of bank robbery" in the section of the warrant used to identify the property to be seized. The district court found "nothing in the transcript of the telephonic application for the warrant to support" this testimony. (J.A. at 84 n.1.)

Although the district court is uniquely suited for assessing witness credibility, *see United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 339 (1952), the aforementioned credibility determinations were, as the district court acknowledged, not based on the cadence, tone, or inflection of Special Agent Lawlor's voice. Nor, for that matter, were they based on any other factor that would be difficult to evaluate on appeal. Instead, they were based on the content of his testimony. As a result, we are as uniquely suited for assessing these particular findings as the district court.

We cannot say that Special Agent Lawlor's explanation for seeking a telephonic warrant strains credibility. Although the agents had probable cause to arrest Dickerson, there is no requirement that the police arrest a suspect the very moment that probable cause is established. Indeed, there are legitimate law enforcement reasons not to do so. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 791 (1977) (noting that there are legitimate reasons not to arrest a suspect the moment probable cause is established); *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (recognizing that need to delay arrests even after probable cause is established). As such, we do not believe, as the district court seemingly suggests, that a telephonic warrant was improperly obtained in this case, *see* Fed. R. Crim. P. 41(c) (2) (authorizing telephonic warrants), or that Special Agent Lawlor was untruthful when he testified that the agents did not intend to arrest Dickerson without additional evidence.

We also cannot say that "nothing" in the transcript of the telephonic application supports Special Agent Lawlor's testimony that Judge Kenkel instructed him to write "evidence of the crime of bank robbery" in the section of the warrant used to identify the property to be seized. An examination of the transcript reveals that Judge Kenkel instructed Special Agent Lawlor on what to write in virtually every section of the warrant. Although Judge Kenkel did not specifically tell Special Agent Lawlor what to write in the section in question, he did state that there was probable cause to search Dickerson's apartment for "evidence of . . . the bank robbery in question." (J.A. at 69.)

/7 An affidavit attached to the warrant identified the following items:

a. A black leather backpack, and its contents;

b. Currency;

c. Clothing and disguises;

d. Items stained by dye from explosive dye-packs;

e. Firearms, ammunition, and pellet guns;

f. Money or cash straps;

g. Demand notes;

h. Carrying bags;

i. Photographs, in particular, photographs of co-conspirators;

j. Address books, Rolodexes, or other documents containing names of co-conspirators; and

k. Evidence of the disposition of cash obtained in bank or armed robberies.

(J.A. at 85-86.)

/8 Although 7:30 p.m. does not correspond with the time that either Detective Durkin or Special Agent Lawlor gave for when Dickerson was read his *Miranda* rights, Detective Durkin explained in his affidavit that when Dickerson wrote 7:30 p.m., he "specifically recall[ed] thinking that Dickerson had no idea what time it was." (J.A. at 121.) In any event, the hand-written statement does correspond with the sequence of events that is so crucial to this appeal. Specifically, the statement corroborates the agents' position that Dickerson was read his *Miranda* warnings prior to his confession.

/9 Dickerson's hand-written statement reads, in pertinent part, as follows:

> I was read my rights at 7:30 [b]ut I was here at 5:30. I talked to the two Detectives . . . [for] two and a half hours and then was asked to take a polygraph test. I declined because after two hours I had knowledge of the bank robbery. I told them I know nothing of the bank robbery that happened Friday. Befor[e] today I didn't have any knowle[dge] of the bank robbery.

(J.A. at 123.)

/10 Dickerson contends that federal law does not grant the Government the right to appeal an order denying reconsideration of a suppression ruling. It is well established that the Government cannot appeal an adverse ruling in a criminal prosecution without statutory authority. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Sanges*, 144 U.S. 310, 312 (1892). Such authority, the Government maintains, is contained in 18 U.S.C.A. § 3731 (West Supp. 1998). *See United States v. Scott*, 437 U.S. 82, 84-85 (1978) (discussing the enactment of § 3731 to provide government appeals in criminal cases).

Section 3731 provides, in pertinent part, as follows:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence.
>
> . . . .
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C.A. § 3731. Although § 3731 authorizes the Government to appeal orders suppressing evidence, Dickerson contends that it does not expressly authorize the Government to appeal a decision denying reconsideration of a suppression ruling. The issue, not heretofore decided by this Court, is whether § 3731, which provides that it should be liberally construed to effectuate its purposes, can be so construed as to authorize this appeal. We conclude, for the reasons that follow, that it can.

In *United States v. Ibarra*, 502 U.S. 1 (1991) (per curiam), the defendant was indicted for possession of cocaine with intent to distribute. *See id.* at 2. The district court, however, ordered that certain evidence be suppressed. *See United States v. Ibarra*, 725 F. Supp. 1195, 1202 (D. Wyo. 1989). The Government filed a motion for reconsideration, which was denied. *See United States v. Ibarra*, 731 F. Supp. 1037, 1041 (D. Wyo. 1990). On appeal, the Tenth Circuit dismissed the Government's appeal as untimely. *See United States v. Ibarra*, 920 F.2d 702, 707 (10th Cir. 1990) (holding that appeal must be filed within thirty days of a district court's suppression ruling). On petition for certiorari, the Supreme Court held that the thirty-day period in which the Government was required to file its appeal under § 3731 began to run on the date that the district court denied the Government's motion for reconsideration, not on the date of the district court's original suppression order. *See Ibarra*, 502 U.S. at 6-7. In so holding, the Supreme Court necessarily concluded that § 3731 authorizes the Government to appeal a decision denying reconsideration of a suppression ruling.

Our conclusion that we have jurisdiction to hear this appeal is also buttressed by the knowledge that, in enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975); *see also Arizona v. Manypenny*, 451 U.S. 232, 247 & n.24, 249 (1981) (noting that Government appeals are permitted to the extent that they are not prohibited by the Constitution). Dickerson does not contend that the instant appeal is constitutionally prohibited. Thus, Dickerson's suggestion that we lack jurisdiction to hear this appeal is without merit. *Accord United States v. Hassan*, 83 F.3d 693, 697 (5th Cir. 1996) (holding that "'an appeal from a denial of a motion to reconsider necessarily raises the underlying [suppression] judgment for review'" (quoting *United States v. Herrold*, 962 F.2d 1131, 1136 (3d Cir. 1992))); *United States v. Roberts*, 978 F.2d 17, 18 (1st Cir. 1992) (entertaining Government's appeal from the denial of a motion to reconsider a suppression ruling).

/11 We note that granting a new trial on the basis of evidence available at the time of the trial is strictly prohibited. *See, e.g., United States v. Bales*, 813 F.2d 1289, 1295 (4th Cir. 1987) (noting that under Fed. R. Crim. P. 33 "the evidence must be, in fact, newly discovered, *i.e.*, discovered since the trial"); *United States v. Singh*, 54 F.3d 1182, 1190 (4th Cir. 1995) (same). Of course, Rule 33 of the Federal Rules of Criminal Procedure, which governs new trial motions, does not apply to motions for reconsideration of evidentiary rulings prior to trial. As such, granting a motion for reconsideration on the basis of evidence available to the movant at the time of the suppression hearing is not strictly prohibited.

/12 We do not mean to imply that the Federal Rules of Evidence are binding at a suppression hearing; they are not. *See* Fed. R. Evid. 104(a) (providing that the rules of evidence are not binding at a preliminary proceeding). We refer to Rule 403 only because it casts some light on the phrase "cumulative evidence."

/13 In its motion for reconsideration, the Government confessed that "this [was] one of those deals where they [threw] the case at [the Assistant United States Attorney] at 4:00 on the day before [the hearing]." *United States v. Dickerson*, 971 F. Supp. 1023, 1025 n.2 (E.D. Va. 1997) (final alteration in original). Similarly, during the hearing on the motion to reconsider the Government acknowledged "that the Assistant United States Attorney had very little time to prepare [Special] Agent Lawlor." *Id.* at 1024. Had the Government simply compared Special Agent Lawlor's recollection of events against its documentary evidence prior to the suppression hearing, it would have discovered the need to introduce additional evidence.

While we respect the Government's candidness on this point, it raises further questions relating to the proffered reasons for failing to present the additional affidavits and statement earlier. For example, if the

Government failed to prepare and present its case properly, we wonder how it could have known that additional evidence would be needlessly cumulative.

/14 Pursuant to Local Rule 27(c), the clerk's office granted the unopposed motion of the Washington Legal Foundation and the Safe Streets Coalition (amici) to file a brief in this case. In light of the Government's unwillingness to defend the constitutionality of § 3501, amici also sought leave to share five minutes of the Government's allotted oral argument time. Under the Federal Rules of Appellate Procedure, "[a] motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons." Fed. R. App. P. 29. Because the Department of Justice's refusal to defend the constitutionality of an Act of Congress is an extraordinary event, we granted amici's motion to share oral argument time with the Government. Indeed, federal courts have frequently appointed amici to participate in oral argument where neither side will defend an important position. *See, e.g., Bousley v. United States*, 118 S. Ct. 1604, 1609 (1998) (inviting private party to file an amicus brief and to participate in oral argument when Government declined to defend ruling in its favor); *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 n.9, 599 n.24 (1983) (same); *McKinney v. Indiana Michigan Power Co.*, 113 F.3d 770, 772 n.2 (7th Cir. 1996) (appointing amicus "so that [the court] might have the benefit of an adversary presentation of the issues raised by the appeal"); *United States v. Chagra*, 701 F.2d 354, 366 (5th Cir. 1983) (appointing amicus "to ensure that this appeal continues to be presented in an adversary context").

Amici urged this Court, both in its brief and during oral argument, to consider the admissibility of Dickerson's confession under the mandate of § 3501. Although we had the benefit of amici's briefing, the dissent criticizes our application of § 3501 "without the benefit of any briefing in opposition." *Post* at 47. Although we would have preferred to have had such briefing, the Department of Justice, as we note in greater detail above, actually prohibited the U.S. Attorney's Office from briefing § 3501 in this case. *Cf.* Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division § Chiefs (Nov. 6, 1997) (forbidding "federal prosecutors [from] rely[ing] on the voluntariness provision of § 3501"). Moreover, when pressed at oral argument, counsel for the United States informed the Court that he had been prohibited by his superiors at the Department of Justice from discussing § 3501. Because it is our duty to apply the governing law to every case or controversy before us, it was unfortunately necessary to proceed without any briefing from the Department of Justice.

/15 Justice's refusal to invoke § 3501 has not been limited to this Circuit. In *Cheely v. United States*, 21 F.3d 914 (9th Cir. 1994), the Ninth Circuit suppressed an incriminating statement that was obtained in technical violation of *Edwards*. *Id.* at 923. Although the Government did not petition for rehearing, the Ninth Circuit *sua sponte* asked the parties whether the case merited rehearing en banc. *See Cheely v. United States*, 92-30257 (9th Cir. May 25, 1994) (unpublished order). Curiously, Justice filed a memorandum opposing further review. One week later, the Supreme Court in *Davis v. United States*, 512 U.S. 452 (1994), would bring § 3501 to the attention of the legal community. In response, a career federal prosecutor sent a letter to the Ninth Circuit apprising them of the Court's decision in *Davis*. Later that same day, Solicitor General Drew Days withdrew the earlier letter and replaced it with a letter that downplayed the relevance of *Davis* to the issues at hand. Notwithstanding the letter from the Solicitor General, the Ninth Circuit "called for supplemental briefing from the parties as to the effect *Davis* might have on our conclusion" to suppress the statements in question. *Cheely v. United States*, 36 F.3d 1439, 1448 (9th Cir. 1994). Although Justice filed a supplemental brief, it nevertheless failed to even argue the applicability of § 3501. Upon reconsideration, the Ninth Circuit still suppressed the statement. *See id.*

/16 The Department of Justice has taken the position that unless the Supreme Court overrules *Miranda*, "the United States is not free to urge the lower courts" to "rely on § 3501." *See* Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division § Chiefs (Nov. 6, 1997) (noting that "[t]he Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda*").

/17 The dissent argues, and we do not dispute, that "the only issues not raised by the parties that we are *required* to consider are those of subject matter jurisdiction and justiciability." *Post* at 48 (emphasis added).

That observation, however, is of no real import. First, as we note above, this Court may, in its discretion, consider issues not raised below. *See post* at 25-26. Second, and more importantly, we are not considering an issue that was not raised by the parties. The issue on appeal is the district court's suppression ruling. Without question, we are free to address ourselves to any legal theory that would bear on the issue under appeal. *See Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274, 275 n.1 (4th Cir. 1997) ("We have consistently recognized that we may [decide a case] on different grounds than those employed by the district court."); *Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993) (same). Thus, because the Government has appealed the district court's suppression ruling, we are free to consider the applicability of § 3501.

/18 The four warnings are: (1) that the suspect has the right to remain silent; (2) that any statements he makes can be used against him; (3) that he has the right to the presence of an attorney during questioning; and (4) that an attorney will be appointed for him if he cannot afford one. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

/19 Interestingly, although this Court has not addressed the effect of § 3501 on either *Miranda* or *McNabb/Mallory*, we have repeatedly cited the provision when making voluntariness determinations without ever suggesting that any part of the section is unconstitutional. *See, e.g., United States v. Braxton*, 112 F.3d 777, 784 & n.* (4th Cir.) (en banc), *cert. denied*, 118 S. Ct. 192 (1997); *United States v. Wilson*, 895 F.2d 168, 172-73 (4th Cir. 1990); *United States v. Pelton*, 835 F.2d 1067, 1074 (4th Cir. 1987); *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984); *United States v. Gonzales*, 736 F.2d 981, 983 (4th Cir. 1984); *United States v. Dodier*, 630 F.2d 232, 236 (4th Cir. 1980); *United States v. Sauls*, 520 F.2d 568, 569 (4th Cir. 1975); *United States v. Johnson*, 495 F.2d 378, 382 (4th Cir. 1974). Indeed, in *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998), we recently held that a fifty-five hour delay between the defendant's arrest and arraignment did not render the defendant's confession inadmissible, without citing either *McNabb* or *Mallory*, because under the mandate of § 3501 such delay "is only one factor to be considered when determining the admissibility of a confession." *Id.* at 348-49.

/20 Conclusive presumptions are "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). As the Supreme Court has explained in another context: "*Per se* rules . . . require the Court to make broad generalizations. . .. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). It is apparent, therefore, that conclusive presumptions, like the one contained in *Miranda*, are dictated by convenience, not the Constitution.

/21 The dissent does not dispute that the applicability of § 3501 turns on whether *Miranda* is a constitutional rule. Even more telling, after considering the merits, the dissent is unable to conclude that *Miranda* 's conclusive presumption is, in fact, required by the Constitution. In the end, the dissent poses only the following rhetorical question: "If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts." *Post* at 50. As noted above, the Supreme Court has stated in unmistakable terms that the rule set forth in *Miranda* is not required by the Constitution. *See ante* at 35-38. In fact, in one of the Supreme Court's most recent applications of *Miranda* to a state court prosecution the Supreme Court specifically stated that "*Miranda* 's safeguards are not constitutional in character." *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993). Thus, although the dissent raises an interesting academic question, the answer to why the Supreme Court applies *Miranda* in prosecutions arising in state courts has no bearing on our conclusion that *Miranda* 's conclusive presumption is not required by the Constitution.

/22 In addition to recognizing the harmful effects created by *Miranda* 's irrebuttable presumption, Congress concluded that the Court's justification for the conclusive presumption - that custodial interrogations were inherently coercive and intimidating - was simply incorrect as an empirical matter. *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. During the subcommittee hearings, Senator Arlen Specter,

then the district attorney of the City of Philadelphia, pointed out

> that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for their opinion in *Miranda* is not a correct portrayal of what actually goes on in police stations across the country. While there are isolated cases of police using coercive tactics, this is the exception rather than the rule.

Id. at 2134. Similarly, the final committee report concluded that the basis for the conclusive presumption in *Miranda* was faulty. *Id.* at 2142 (noting that the "data supporting the [Court's] conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed"); *id.* at 2134 (noting that "while . . . coercive practices might have been approved 30 years ago, they have no place in modern police techniques"); *id.* (finding that "the Court overreacted to defense claims that police brutality is widespread").

In sum, Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive. As Senator Sam Ervin noted at the time § 3501 was enacted:

> A decision of the Supreme Court, if it is based on a factual assumption which is incorrect, may be subject to Congress' power to legislate. The Supreme Court has no right to make . . . determinations based on unsound factual assumptions. I don't believe the great majority of law enforcement officers in the United States are such disreputable people that they have to have the criminals protected against them.

Hearings on the Supreme Court Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 25 (1968). Senator Ervin's observation concerning Congress's authority to overrule Supreme Court decisions, whether or not correct as a general matter, is certainly correct when applied to judicially created presumptions. *See ante* note 20. It is well established that a conclusive presumption "should not be applied . . . in situations where the generalization is incorrect as an empirical matter." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). In fact, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* According to congressional findings, the basis for *Miranda* 's conclusive presumption is incorrect as an empirical matter, and the presumption does not reach the correct result, *i.e.*, suppressing only coerced confessions, most of the time that it is applied. As a result, Congress, pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts, was justified in abandoning the conclusive presumption when it enacted § 3501.

/23 The agents also found a small quantity of drugs in plain view.

MICHAEL, Circuit Judge, dissenting in part and concurring in part:

Thirty years have passed since Congress enacted 18 U.S.C. § 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use § 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that § 3501 must be invoked. After making that judgment call, the majority holds that the section is constitutional, without the benefit of any briefing in opposition. In pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should. I therefore respectfully dissent from the parts of the majority opinion that deal with § 3501. As for the search warrant, I would uphold it under *Leon* 's good faith exception, but I dissent from the holding that the warrant is sufficiently specific.

I.

The majority begins its reach to inject § 3501 into this case with an overstatement. It says that the § 3501 issue is "squarely presented." Ante at 2; *see also* ante at 4 ("the question of whether § 3501 governs the

admissibility of confessions in federal court is squarely before us today"). In its brief to us the government has said plainly, "we are not making an argument based on § 3501 in this appeal." Appellant's Opening Br. at 34. The defendant, of course, does not mention § 3501. Thus, we are not being urged to inject § 3501 into this case by anyone except the *amici*, the Washington Legal Foundation and the Safe Streets Coalition. That is not enough to put the issue of § 3501's constitutionality and application squarely before us. Perhaps [Page 48] the majority recognizes as much, for it quickly moves to an argument about why the court itself should force § 3501 into this case.

The majority's argument for taking up § 3501 is as follows. First, the Department of Justice will not defend the constitutionality of § 3501, so the question whether the statute or *Miranda* governs the admission of federal confessions will not be decided unless we act on our own. Second, Dickerson's confession in this case is admissible under § 3501 but not under *Miranda*. "As a result," the majority concludes, "we are *required* to consider the issue now." Ante at 26 (emphasis added). One thing I am sure of is that we are not required to consider a § 3501 issue when it is raised only in an *amicus* brief. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994) ("declin[ing] the invitation of some *amici* to consider" § 3501). Indeed, the only issues not raised by the parties that we are required to consider are those of subject matter jurisdiction and justiciability. *See e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977) ("we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction"); *Juidice v. Vail*, 430 U.S. 327, 331 (1977) ("Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III"); *LaFaut v. Smith*, 834 F.2d 389, 394-95 n.9 (4th Cir. 1987) (concluding that whether a claim is moot "is a jurisdictional question that the court is obliged to consider *sua sponte* whenever it arises") (citations omitted). We have jurisdiction in this case, and it is fit for adjudication. The real question, therefore, is whether we should exercise our discretion and consider § 3501, when no party has invoked the statute. I believe that the situation calls for the exercise of judicial restraint; we should stay away from the § 3501 issue.

To start with, I cannot agree with the majority's accusation that the Department of Justice "elevat[ed] politics over law" when it prevented the United States Attorney from invoking § 3501 in an effort to save Dickerson's confession. *See* ante at 4. A move to admit more confessions could be touted as aggressive prosecution, so I would think it might be better politics to invoke § 3501. In any event, I see no evidence that the Department of Justice is putting politics over law when it comes to § 3501. The Department's view - that § 3501 cannot be [Page 49] used to admit confessions that *Miranda* would exclude - is a view that I accept as genuine.

I believe that *Davis v. United States*, 512 U.S. 452 (1994), remains sound authority for us to decline consideration of § 3501 on the invitation of an *amicus*. In *Davis* the Court did not take up § 3501 because "the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position." *Id.* at 457 n.*. Our panel majority says that everything has changed since *Davis* because the Attorney General has now written Congress, saying that the Department of Justice will not defend the constitutionality of § 3501. *See* ante at 3-4, 25. I do not think the Attorney General's letter changes anything. It simply confirms what the Supreme Court already knew in *Davis*, that is, that the Department of Justice was not going to invoke the statute to try to salvage confessions. *See Davis*, 512 U.S. at 463 (Scalia, J., concurring) ("This is not the first case in which the United States has declined to invoke § 3501 before us - nor even the first case in which that failure has been called to its attention."). The majority also contends that *Davis* is distinguishable because the Supreme Court saved that confession on another ground, making consideration of § 3501 unnecessary. That is not why the Court declined to consider § 3501. The Court said specifically "that the Government has not sought to rely in this case on 18 U.S.C. § 3501, . . . and we therefore decline the invitation of some amici to consider it." *Davis*, 512 U.S. at 457 n.*. *See also id.* at 462 n.* ("the Court today bases its refusal to consider § 3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it") (Scalia, J., concurring). Thus, we are faced with essentially the same situation that the Supreme Court confronted in *Davis* when it refused to take up § 3501: the government has expressly declined to "mak[e] an argument based on § 3501 in this appeal," Appellant's Opening Br. at 34, and we are free to reject *amici* 's call for its

consideration.

It is a mistake for our court to push § 3501 into this case for several reasons. First, courts as a general rule do not interfere with the executive's broad discretion in the initiation and conduct of criminal prosecutions. *See generally United States v. Armstrong,* 116 S. Ct. 1480, 1486 (1996); *United States v. Juvenile Male J.A.J.,* 134 F.3d 905, 907 (8th Cir. 1998). Forcing the use of § 3501 upon a United States Attorney [Page 50] gets uncomfortably close to encroaching upon the prosecutor's routine discretion. I recognize, of course, that courts have a large measure of control over the course of a case once it is filed. But a decision not to invoke § 3501 in response to a motion to suppress a confession is a matter of prosecutorial strategy. We should leave that to the executive. There is also a related point. In invoking § 3501, the majority overrides 30 years of Department of Justice prosecutorial policy. Any change in this policy should come from Justice.

Second, it is "a sound prudential practice" for us to avoid issues not raised by the parties. *See Davis,* 512 U.S. at 464 (Scalia, J., concurring). This is because "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). We perform our role as neutral arbiter best when we let the parties raise the issues, and both sides brief and argue them fully. That did not happen here. By invoking § 3501, the majority injects into this case the overriding constitutional question of whether § 3501 can supersede *Miranda.* It then decides the question against the defendant, when the only briefing we have on the issue is about two pages from *amici* that the majority agrees with. The majority holds that § 3501 governs the admissibility of confessions in federal court because *Miranda* is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on *both* sides to answer one question for me. If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? *See, e.g., Stansberry v. California,* 511 U.S. 318 (1994) (per curiam); *see also Mu'Min v. Virginia,* 500 U.S. 415, 422 (1996) (noting that with respect to cases tried in state court, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution"). This question illustrates that the § 3501 issue is so sweeping that we should not be delving into it on our own. In this case, we should follow our usual practice of deciding only the issues raised by the parties. /* [Page 51]

The majority's fallback position is that if we do not press the use of § 3501, no one else will. *See* ante at 26. This overlooks Congress. If another branch is to question and investigate the executive's 30-year policy of not using § 3501, it should be Congress. After all, Congress - consistent with separation of powers principles - uses the public hearings process to examine the policies and conduct of the executive. That process has been used on occasion to question the executive's exercise of prosecutorial discretion and the formulation of litigation strategy. *See Ameron, Inc. v. United States Army Corps of Engineers,* 809 F.2d 979, 991 n.8 (3d Cir. 1986). Congress therefore may legitimately investigate why the executive has ignored § 3501 and what the consequences are. The legislative branch is better equipped than we are to investigate, for example, the question raised by Justice Scalia in his concurring opinion in *Davis:* whether the government's failure to invoke § 3501 *"may* have produced . . . the acquittal and the nonprosecution of many dangerous felons." *Davis,* 512 U.S. at 465 (emphasis added). Whether the answer to that question or other considerations should be used to prod the executive into changing its policy with respect to § 3501 is a matter that I would leave to Congress.

Because I would not invoke § 3501, I would affirm the district court's order denying the government's motion to reconsider the admissibility of Dickerson's confession for the reasons stated in part II.A. of the majority opinion.

II.

As for the physical evidence seized from Dickerson's apartment, I agree with the majority's conclusion that it should have been admitted [Page 52] under the good faith exception. I respectfully disagree, however,

with the majority's conclusion that a warrant permitting a search for "evidence of the crime of bank robbery" is sufficiently particular under the Fourth Amendment.

A warrant must guide the executing officer with a particular description of the items to be seized. *See United States v. Wolfenbarger,* 696 F.2d 750, 752 (10th Cir. 1982) ("A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized.") (citation omitted). Thus, a warrant authorizing seizure of "address books, diaries, business records, documents, receipts, warranty books, guns, stereo equipment, [and] color television which are evidence of violation of Georgia State Statute 16-8-2 Theft by Taking" is sufficiently particular because it identifies the universe of items to be seized. *See United States v. Fawole,* 785 F.2d 1141, 1144 (4th Cir. 1986). On the other hand, a warrant for seizure of "'any other evidence relating to the commission of a crime ' plainly is not sufficiently particular with respect to the things to be seized." *United States v. George,* 975 F.2d 72, 75 (2d Cir. 1992).

I recognize that courts on occasion have upheld warrants authorizing the seizure of the "instrumentalities" of certain distinctive crimes. Nevertheless, I believe "evidence of the crime of bank robbery" is far too general. That description does nothing to confine the discretion of an executing officer, especially if the warrant is relayed for execution by an officer who has never served on a bank robbery squad. A search for evidence of bank robbery would surely include a search for guns, masks, and cash. But what else? It might be construed to allow a search through all financial records, as well as a search for any items purchased. Under this interpretation, virtually no piece of paper or property would be beyond the bounds of a search. The description in the warrant here was simply too general to satisfy Fourth Amendment standards.

FOOTNOTES

/* The majority misses my point when it erroneously suggests that I have examined all of the relevant authority and cannot conclude that *Miranda* renders § 3501 unconstitutional. *See* ante at n.21, 42. My point is that we should not be examining the question at all, much less deciding it. For the record, however, not everyone agrees with the majority. *See* 1 Charles Alan Wright, Federal Practice and Procedure § 76 (2d ed. 1982) ("Unless the [Supreme] Court overrules Miranda, or holds that the 1968 statute [§ 3501] has successfully accomplished this, lower courts must follow the decision rather than the statute."); 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.5(e) (1984) (§ 3501 "is unconstitutional to the extent that it purports to repeal *Miranda.")*.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Defendant's Motion to Suppress is GRANTED at to his statements offered at the FBI Field Office on January 27, 1997, and items discovered during the search of his home that evening;

(2) Defendant's Motion to Suppress is DENIED as to the search of his Oldsmobile Ciera; and

(3) the clerk shall forward copies of this Order and Memorandum Opinion to counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

July 1, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Charles Thomas Dickerson's Motion to Suppress. For the reasons set forth below, Defendant's Motion is GRANTED in part and DENIED in part.

Facts.

Defendant was arrested on January 27, 1997 and subsequently charged with Conspiracy to Commit Bank Robbery, three Counts of Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d), and three counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. 924(c). He now moves to suppress his confession and evidence seized during searches of his house and automobiles.

On January 24, 1997, a NationsBank in Alexandria, Virginia was robbed. Shortly thereafter, and prior to the occurrence of events germaine to this Motion, Federal Bureau of Investigation

("FBI") Special Agent Christopher Lawlor ("Agent Lawlor"), the lead agent on the case, learned that the robbery had been "committed with a large, silver, semi-automatic handgun and a black leather backpack . . . , that approximately $876 was taken in the robbery, and that no dye pack or bait money was given to the robbers." Lawlor Aff. at ¶ 4. Moreover, witnesses had seen one of the robbers, later identified as James Rochester ("Rochester"), leave the bank and get directly into a Oldsmobile Ciera ("Ciera") positively identified as belonging to Dickerson.

Working from the witnesses' description of the getaway car, including its tag number, Agent Lawlor and several other local and federal law enforcement agents and officers arrived at Dickerson's Takoma Park, Maryland apartment at approximately 5:30 on the afternoon of January 27, 1997. They identified the Ciera used in the robbery and a Chevrolet Caprice also registered to Dickerson parked nearby. A little over an hour later, the agents and officers knocked on Dickerson's door.

At this point, Agent Lawlor's version of events differs substantially from Dickerson's.

According to Agent Lawlor, only four officers and agents came into the apartment and, despite the fact that the officers and agents had been afforded over an hour to plan their encounter with a suspected armed robber in his own home, Agent Lawlor did Lawlor did not have his gun drawn, and "didn't expect one way or the other" whether his colleagues would have theirs drawn. Tr. at 27. After some delay, Dickerson opened the door and allowed the agents and officers in. The agents and officers then asked Dickerson if he would come with them to the station. Dickerson agreed, but asked if he could retrieve his coat from the bedroom. When Dickerson turned to get his coat from an adjoining room, Agent Lawlor and another agent followed him "for their safety." Tr. at 10.

As Dickerson picked up his coat from the bed, the agents observed money later determined to be $552 fall onto Dickerson's bed. Dickerson told the agents that the money consisted of gambling winnings from a recent trip to Atlantic City and put the money in his coat pocket. The officers and agents in the house observed no other incriminating evidence or contraband. They asked Dickerson for permission to search the house, but he refused. He then accompanied the officers to the FBI field office in Washington, D.C.

According to Dickerson's account of events, about 10 agents and officers came to his apartment with their guns drawn, although only a few entered, including Agent Lawlor. Dickerson testified that the officers and agents entered uninvited. He further testified that he felt he had no choice but to accompany

the officers to the station.

Once at the station, Dickerson was interviewed by Agent Lawlor and another agent. Initially, Dickerson denied any involvement in the robbery, admitting only that he had been in the vicinity of the bank when the robbery occurred.

At one point, Agent Lawlor left the interview room and called United States Magistrate Judge for the District of Maryland James E. Kenkel to obtain a search warrant for Dickerson's home. As probable cause for the warrant, Agent Lawlor described the circumstances of the robbery and the fact that the getaway car had been traced to Dickerson. In addition, Agent Lawlor noted that Dickerson, who had been behind on his rent, had just made a $1,350 payment to his landlord, and that Agent Lawlor had seen the $552 addressed earlier. Moreover, Agent Lawlor asserted that exigent circumstances existed because "Mr. Dickerson is not under arrest at this point, and is free to go home. Ah, should he go home, ah, we believe that is, that, ah, he could destroy evidence of the robbery. . . ." Tr. of Telephonic Aff. Judge Kenkel found "probable cause to believe at the residence there may be. . .evidence of. . .the bank robbery in question." Id. During the colloquy between Judge Kenkel and Agent Lawlor, there was no discussion whatsoever of what in particular would be sought. Tr. at 25. The warrant itself only offered that there was reason to believe that "evidence of the crime of bank robbery" would be found at Dickerson's house.[1] The warrant was approved at 8:50 p.m.

At the hearing on this Motion, Agent Lawlor testified that when he talked to Judge Kenkel, Agent Lawlor knew that the $552 was no longer in Dickerson's residence, but was in fact at the station. Tr. at 24. In fact, Dickerson had already allowed Agent Lawlor to count, inspect, and seize the money. Tr. at 10-11. Agent Lawlor further testified that he had seen no other incriminating evidence and that "he had no way of knowing" what the searchers would find. Tr. at 25-26.

After obtaining the warrant, Agent Lawlor dispatched other agents and officers to conduct the search of Dickerson's house, instructing them to look for "evidence of the crime of bank robbery." Lawlor Aff. at ¶6. Agent Lawlor then returned to the

---

[1] At the hearing, Agent Lawlor testified:
Question by AUSA Spencer: On the front, face sheet of the warrant, there's a section about the items to be seized or searched for. Who wrote the information in that section?
A: I did.
Q: Did you decide what words to put in there or did someone else decide?
A: No, someone else.
Q: Who was that?
A: The Judge.
Tr. at 15. There is nothing in the transcript of the telephonic application for the warrant to support Agent Lawlor's sworn testimony.

interrogation room, and told Dickerson that his house was about to be searched. Tr. at 15. Dickerson then decided that he wanted to offer a statement. Tr. at 16. "At that point," Agent Lawlor testified, Dickerson was read his rights, waived them, and signed a rights-waiver form. That form was marked as being executed at 9:41 p.m. According to Agent Lawlor, Dickerson then offered the statement that is the subject of the present Motion.

Dickerson's account of events at the FBI Field Office materially differs only in that he asserts that he gave his statement before being read his rights and signing the rights-waiver form.

The subsequent search of Dickerson's home revealed the silver .45 caliber handgun allegedly used in the January 24 robbery, dye stained money and a bait bill from another robbery, and other evidence. Gov't. 2d Sup. Mem. at 6.

On March 28, 1997, Agent Lawlor obtained warrants to search each of the cars present at Dickerson's house. The affidavit attached to the warrant specified that items sought included:

a. A black leather backpack, and its contents;
b. Currency;
c. Clothing and disguises;
d Items stained by dye from explosive dye-packs;
e. Firearms, ammunition, and pellet guns;
f. Money or cash straps;
g. Demand notes;
h. Carrying bags;
i. Photographs, in particular, photographs of co-conspirators;
j. Address books, Rolodexes, or other documents containing names of co-conspirators; and
k. Evidence of the disposition of cash obtained in bank or armed robberies.

From the Ciera identified by witnesses to the January 27 robbery, agents recovered a black leather backpack and solvent used to clean dye-stained money. Nothing of note was recovered from the search of the Caprice, which will not be considered further.[2]

II.

Dickerson seeks to exclude statements he made to Agent Lawlor at the FBI field office and items recovered from the search of his home, asserting that government conduct violated rights protected by the Fourth and Fifth Amendments to the Federal Constitution.

A. Dickerson's Fourth Amendment Claim.

Since 1984, analysis of motions to suppress evidence allegedly obtained in violation of the Fourth Amendment is a two-step analysis. See United States v. Leon, 468 U.S. 897, 913 (1984). First, the Court considers whether a violation of the Fourth Amendment in-fact occurred. Second, if the Court finds a

---

[2]Dickerson's challenge to the search of his Ciera does not detain the Court long. Even if the Court were to hold that all of Dickerson's statements were illegally obtained and that the search of his house was in violation of the Fourth Amendment, probable cause for search of the Ciera exists based solely on the admissions of James Rochester and the testimony of the witnesses who identified the cars. See California v. Acevedo, 500 U.S. 565 (1991).

constitutional violation, the Court must determine if the law enforcement officers nonetheless acted in good faith. If the government prevails on either prong of this test, the evidence may not be suppressed. Id.; see also Massachusetts v. Sheppard, 468 U.S. 981, 990 n.6 (1984) (officer who applied for warrant, expressed questions about the warrant's validity, and conducted the ensuing search was reasonable in relying on a magistrate judge's assurances that apparently defective warrant was "sufficient in form and content"). Both determinations are questions of law. See United States v. George, 975 F.2d 72, 77 (2d Cir. 1992).

1. The Warrant was Invalidly Vague.

In order to be valid under the Fourth Amendment, a search warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV. This provision was crafted as a bulwark against general warrants employed by British colonial officials. Stanford v. Texas, 379 U.S. 476, 481 (1965). A sufficiently particular warrant describes the items to be seized in such a manner that "nothing is left to the discretion of the officer executing the warrant." Id. at 485 (quoting Marron v. United States, 275 U.S. 192, 196 (1927).

In Andresen v. Maryland, the Supreme Court held valid a warrant seeking a long list of specified items "together with other fruits, instrumentalities, and evidence of crime at this (time) unknown." 427 U.S. 463, 482 n. 10. The crime charged in Andresen was a "complex real estate scheme" involving a specific piece of land. There, the Court carved out an exception to the particularity requirement so that "[t]he complexity of an illegal scheme may not be used as a shield. . . ." Id.; see also United States v. Wuagneux, 683 F.2d 1343, 1348-49 (11th Cir. 1982) (taking into account the "practical necessities" in assembling the "paper puzzle" incumbent on solving "white collar crime").

The Andresen exception does not apply here, for three reasons. First, the warrant in Andresen was sufficiently particular to get searchers headed in the right direction, focusing them on "evidence relating to 'the crime of false pretenses with respect to Lot 13T.'" Searchers here had no such guidance. Second, the crime charged here is a simple bank robbery, not a "complex scheme." Evidence of the crime of bank robbery could include many ordinary household items and personal effects that the government knew were not associated with this crime. Finally, while the warrant in Andresen sought evidence the precise nature of which was unknowable at the time the warrant issued, Officer Lawlor and his colleagues knew the amount of cash taken and the description of the pistol and backpack used in the robbery before visiting Dickerson.

Nor is this case like United States v. Robertson, 21 F.3d 1030 (10th Cir. 1994), a car jacking case relied upon by the government,

in which the Tenth Circuit upheld a warrant authorizing the seizure of four specific, easily distinguishable items "and other instrumentalities and fruits of the crime of armed car jacking." 21 F.3d at 1031. In Robertson, the victim "told the agent that the property missing from his car included those four items, but he could not recall and specifically describe the rest of his things, most of which were clothing." The Court held that

> even a 'warrant that describes items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit.' The agents tried to get a detailed description from [the victim] before seeking the warrant. However, [the victim] was distraught and could not specifically recall more than a few items. Most of his things were so commonplace that [the victim] never could have given the agent any distinguishing details about them. Furthermore, because on agent had already interviewed Robertson about the crime, Robertson probably would have removed the evidence if the agents had waited to see if [the victim] could better describe his property later.
>
> * * *
>
> Even if generic descriptions are necessary, however, "the fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and 'warrants are conclusively invalidated by their failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized."

Id. at 1033 (citations omitted).[3] Ultimately, the key to the court's ruling was that the challenged warrant "could not have given the agents any more guidance in determining what they could seize." Id.

Unlike his counterparts in Robertson, Agent Lawlor did not insure that the warrant specified the items that he and others in the government knew were used by the bank robbers, i.e. "a large silver, semi-automatic handgun and a black leather backpack," nor did the warrant give any hint of the amount of money taken from the bank, i.e. "approximately $876."[4] See Lawlor Aff. at 4. Accordingly, the government failed to "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow[ed]." Id. at 1033. Because "warrants are conclusively invalidated by their failure to specify as nearly as

---

[3]The government also relies on this passage in an attempt to invoke an "exigent circumstances" exception to the particularity requirement. Along these lines, Agent Lawlor told Magistrate Judge Kenkel that "Our reasons for the exigent circumstances for the, ah, search is that, ah, the, ah, Mr. Dickerson is not under arrest at this point and is free to go home." It strains credibility to believe that the FBI would simply release a person who (1) owns a car used in a bank robbery; (2) admits that he was in the vicinity of the robbery in question at the time it was committed; (3) admits that a passenger in his car engaged in behavior that witnesses attribute to the robber; (4) is subsequently discovered with a large sum of cash; and (5) who agents "believe . . . could destroy evidence" of the robbery. Agent Lawlor was not credible in his testimony before this Court, and apparently was less than forthright with the magistrate judge, as well.

[4]Similarly, the warrant did not even imply these factors, as it might have by specifying "evidence of the crime of bank robbery with respect to the robbery of the Alexandria NationsBank on January 24, 1997." Such language would have brought the warrant closer to the form found acceptable by the Supreme Court in Andresen v. Maryland, 427 U.S. 463, 480 (1976).

possible the distinguishing characteristics of the goods to be seized," the warrant under which agents and officers searched Dickerson's residence was invalid as a matter of law. See id.; see also United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980) ("It is settled law that generic classifications in a warrant are acceptable only when a more precise description is not possible.")

2. The Officers Executing the Warrant Acted in Bad Faith.

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court held that evidence seized by officers acting under an invalid warrant may not be excluded solely based on the invalidity of the warrant if the officers acted in "objectively reasonable reliance" on the apparent validity of the warrant. However,

> [t]he Leon Court also outlined four situations in which an officer's reliance on a warrant would not be reasonable:
>
> * * *
>
> (4) the warrant was so facially deficient, by failing to particularize the . . . things to be seized, that the executing officers cannot reasonable presume it to be valid.

United States v. Hyppolite, 65 F.3d 1151, 1156 (4th Cir. 1995), (citing Leon, 468 U.S. at 923.)

In Massachusetts v. Sheppard, 486 U.S. 981 (1984), the companion case to Leon, the Supreme Court held that an officer who conducted a search relying on a facially invalid warrant nonetheless acted in good faith. In Sheppard, the officer actually executing the search was the same officer who had sworn out an affidavit particularizing the items sought. The Court held that because the same officer had conducted the search and limited the search to the items in the affidavit, and ignored the impermissibly broad scope of the warrant as issued, the seized items should not be excluded at trial.

The warrant in question here differs in three fatal respects from the situation in Sheppard. First, unlike the detective in Sheppard, Agent Lawlor neither questioned the magistrate judge regarding the apparent overbreadth of the warrant, nor did he receive assurances from the judge that the objectively invalid warrant was valid as issued. Second, and perhaps more importantly, Agent Lawlor neither sought to attach an affidavit to the warrant nor even told the magistrate judge what would be sought.[5] Finally, Agent Lawlor remained at the station while other officers and agents executed the search warrant. He was therefore unable to focus their search based on his personal knowledge of the case.[6]

---

[5]The closest Agent Lawlor came to informing the magistrate judge what would be sought was including in his narrative that the robber "displayed a handgun and opened a bag." No further statements by Agent Lawlor either identified these items with any particularity or linked them in any way to the premises to be searched.

[6]In United States v. Curry, 911 F.2d 72 (8th Cir. 1990), the court highlighted the importance for the purposes of Leon of having the officer who applies for the warrant actually conduct

Accordingly, for each of these reasons, the agents and officers who executed this warrant can not be said to have acted with the objective reasonableness required by Leon. See United States v. Towne, 997 F.2d 537, 549 (9th Cir. 1993) (reliance on a warrant is objectively unreasonable if the vagueness of the warrant "leaves [searchers] guessing at their task").

B. Dickerson's Fifth Amendment Claim.

Dickerson's claim that his Fifth Amendment rights were violated requires the Court to determine two issues: 1) whether Dickerson was in custody when he was interrogated and 2) if so, whether he was read the warnings required by Miranda v. Arizona and its progeny.

1. Dickerson was in Custody.

The Supreme Court

> held in Miranda that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. Statements elicited in noncompliance with this rule may not be admitted for certain purposes at a criminal trial. An officer's obligation to administer Miranda warnings attaches, however, only where there has been such a restriction on a person's freedom as to render him in custody. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or a restraint on the freedom of movement of the degree associated with a formal arrest.

Stansbury v. California, 511 U.S. 318, 321 (1994) (citations and quotations omitted). This "ultimate inquiry" turns not on the officers' intentions or perceptions, but on "how a reasonable man in the suspect's shoes would have understood his situation." Id. at 324 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)); see United States v. Jones, 818 F.2d 1119, 1123 (4th Cir. 1987). The law in this Circuit is that neither the fact that an interrogation takes place in a police station, nor that the suspect was given a ride to the station by police is, by itself, enough on which to base a finding that a person was in custody. See United States v. Howard, 1997 WL 318068 (4th Cir. June 13, 1997); Jones, 818 F.2d at 1123.

In this case, several armed police officers and federal agents entered Dickerson's home after dark and asked him to accompany them to the station.[7] They then took Dickerson across the state line,

---

the search:

> This fact is significant because in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position would have possessed.

911 F.2d at 78.

[7]This Court lacks the luxury enjoyed by the district court in Howard, where that court was able to rely on the agent's

on a ten-mile ride through the District of Columbia to the FBI field office near Buzzard's Point, in Southwest D.C. He was neither handcuffed, nor arrested, nor told he was not free to go. On the other hand, he was not told that he was free to go. After the interrogation described above, and without leaving the presence of the officers and agents, he was arrested.

---

testimony and discount that of the defendant. Here, both the content of Agent Lawlor's testimony, which was impeached by the government's own exhibits, and his demeanor lacked credibility. See United States v. Howard, 1997 WL 318068 at *2 (4th Cir. June 13, 1997). For example, Agent Lawlor dodged questions about whether his colleagues had their guns drawn. It is simply not credible for a well-trained Special Agent of the FBI to assert that, having had over an hour on-scene to plan a confrontation with a suspect in an armed bank robbery after arriving at the suspect's residence, and then another few minutes immediately outside his door after the suspect stalled when learning that they were peace officers, he "didn't expect one way or the other" about whether his colleagues would have their weapons drawn. Tr. at 27. Because of Agent Lawlor's untruthfulness, and the government's successful impeachment of much of Dickerson's testimony, the Court has pieced together a picture of the events of January 27, 1997 based on the uncontroverted documentary evidence and the Court's assessment of the relative veracity of Dickerson and Agent Lawlor regarding individual disputed factual issues. It is this first-hand assessment of witness credibility, based on demeanor, voice inflection and a totality of other factors not well reflected by an inanimate record, for which the district court is uniquely suited. United States v. Oregon State Medical, 343 U.S. 326, 339 (1952); see also Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949) ("A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (quotations and citations omitted)).

The Court holds that Dickerson was in custody when taken from his residence in the dark of a winter night by armed officers and agents, driven across state lines, interrogated at a location ten miles distant from his home, on the far side of a large and dangerous urban center. Under these circumstances, Dickerson's "freedom of movement" was as restricted as if he had been arrested - he could either stay in the warmth and light of the FBI field office or be cast off into the dark and danger of the Washington night.[8] Moreover, the only circumstance of Dickerson's encounter with the agents that night which would have changed had he been arrested at the outset rather than the end is that he would have been read his rights earlier. To allow law enforcement officers to circumvent Miranda by merely delaying their inevitable arrest of a suspect until he or she offers an uncounseled and unwarned confession would ultimately gut the intent of Miranda and its progeny.[9]

---

[8]The government makes much of the fact that Dickerson apparently knew that he was empowered to refuse permission to search his house when first asked, and thus must have known that he was free to refuse to accompany the armed officers to the field office. The Court is reluctant to convert the exercise of one's rights protected by the Fourth Amendment into a waiver of those protected by the Fifth.

[9]Courts have also emphasized that the ultimate termination of a suspect's encounter with the police somehow reaches back to color how "a reasonable man in the suspect's shoes would have understood his situation." See Stansbury v. California, 511 U.S.

2. Dickerson was not timely advised of his rights.

It is undisputed that, at 9:41 p.m. on January 27, 1997, Dickerson read and signed a right's waiver form. The question before the Court is whether he read and signed the form before or after making his incriminating statements.[10]

Agent Lawlor testified as follows:

Q. (by AUSA) What did you do after you got the warrant?

A. I notified agents who were in the area that we had a warrant, and I went back and told Mr. Dickerson that we were about to search his apartment.

* * *

Q. What was the defendant's reaction when you told him there was a warrant to search his apartment?

A. He decided that he wanted to talk to me again.

Q. At that point, did you read him his rights?

A. Yes, I did.

Tr. at 16. On cross examination, Agent Lawlor tried to stretch the time between his getting the warrant and his notice to the Defendant to "several minutes." Even accepting that he didn't directly tell Dickerson and "at that point" Mirandize him, Agent Lawlor's testimony is in direct conflict with the documentary evidence, which shows that the warrant issued at 8:50 p.m., and Dickerson's testimony that he was Mirandized at the end of "a half hour" long interview. Based on the documentary evidence and the Court's assessment of the credibility of the defendant and Agent Lawlor, the Court finds that Dickerson was not advised of his Miranda rights until after he had completed his statement to the government. Accordingly, those statements will be excluded from use during the government's case-in-chief.

An appropriate Order shall issue.

/s/
UNITED STATES DISTRICT JUDGE

July 1, 1997
Alexandria, Virginia

318, 324 (1994) (citations omitted); see also United States v. Jones, 818 F.2d 1119, 1123 (4th Cir. 1987) ("At the conclusion of the interviews, appellees left the police station together and remained free until the indictment was filed approximately one month later."). Dickerson was arrested at the end of his interview.

[10]It is also not disputed that statements made prior to the issuance of the warrant were unwarned. Accordingly, those statements are inadmissible for the purposes prohibited by Miranda.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Government's Motion to Reconsider is DENIED;

(2) Defendant's Motion for Reconsideration is DENIED; and

(3) the clerk shall forward copies of this Order and Memorandum Opinion to counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

August 4, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on cross Motions of Defendant and the United States which ask this Court to reconsider its Order of July 1, 1997 granting in part Defendant Charles Thomas Dickerson's Motion to Suppress. For the reasons set forth below, both Motions are DENIED.

Facts.

Defendant was arrested on January 27, 1997 and subsequently charged with Conspiracy to Commit Bank Robbery, three Counts of Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d), and three counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. 924(c). On July 1, 1997, this Court granted in part Dickerson's Motion to Suppress certain evidence. Specifically, the Court held that Dickerson's confession was elicited in violation of his rights protected by the Fifth Amendment, and that a search of his home was conducted in violation

of rights protected by the Fourth Amendment. The Court's holding was based in part on its finding that Dickerson's in-court testimony was more credible than that of FBI Special Agent Christopher Lawlor.

In its Motion for Reconsideration, the Government introduces new affidavits that seek to undermine both the Court's holding that Dickerson's rights were violated and the Court's finding that Agent Lawlor's testimony lacked credibility.[1]

Standard of Review.

As there is no provision in the Federal Rules of Criminal Procedure governing motions for reconsideration, the Court will be guided by the standard set in the Civil Rules. Federal Rule of Civil Procedure 59(e) allows "an aggrieved party to file a motion to alter or amend a judgment within ten days of its entry." Hutchison v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). "[C]ourts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law." Id. In examining the motion to reconsider, the Court is mindful of the fact that "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986). "In order to support a motion for reconsideration, 'the movant is obliged to show not only that ... evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered or produced such evidence at the hearing.'" Boryan v. U.S., 884 F.2d 767, 771 (4th Cir. 1989) (quoting Frederick S. Wyle P.C. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). Therefore, evidence brought to the Court's attention which was available to the movant prior to an entry of judgment is "not a basis for granting a motion for reconsideration as a matter of law." Id.

It is within the sole discretion of the Court as to whether the granting of a motion to reconsider is appropriate. Id. at 771. A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court "rethink what the Court

---

[1]In support of his Motion to Reconsider, Dickerson argues that the Court should suppress evidence obtained during the search of Dickerson's Oldsmobile Ciera, the car identified by witnesses as having been used in the Alexandria robbery. The Court based its ruling on both the eyewitness accounts and testimony of James Rochester. Dickerson now argues that Rochester's testimony is fruit of a tree tainted by Dickerson's constitutionally invalid confession. In light of the Fourth Circuit's ground breaking decision in United States v. Elie, 111 F.3d 1135 (4th Cir. 1997), this argument is without merit. Moreover, the search of the Ciera is sufficiently supported by the eyewitness accounts and the inevitable discovery doctrine. See United States v. Nix, 467 U.S. 431 (1984). Accordingly, Defendant's Motion for Reconsideration is DENIED.

ha[s] already thought through--rightly or wrongly." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983).

Analysis.

In the present Motion, the Government has done little more than present new evidence without even arguing that the evidence now set forth was unavailable at the time of the hearing. This failure is fatal to the Motion. At the August 1, 1997 hearing of this Motion, the Government indicated that the Assistant United States Attorney had very little time to prepare Agent Lawlor for his earlier testimony;[2] that the Government anticipated that Agent Lawlor's testimony would sufficiently summarize the testimony of the other agents, whom the Government admits were available to testify but whom it chose not to present; and that Agent Lawlor did not review prior to the hearing the documentary evidence that ultimately undermined his testimony. According to the Government, "[Agent Lawlor] didn't obviously look at those documents, and he obviously wou[illegible]'t lie about it when it's documented like that. So I think that was just an error on his part." The Court does not sit to clean up a party's failure properly to gather, prepare, present, or argue its evidence.[3]

Aside from presenting incompetent evidence, the Government asks the Court to re-evaluate Agent Lawlor's testimony in light of the fact that he apparently broke his neck in a 1996 hockey accident and is thus unable to turn his head. The Court's assessment of Agent Lawlor's veracity was based on the content of his testimony and the cadence, tone, and inflection of his voice, and was aided by defense counsel's adept impeachment. The Court assumes that none of these factors was affected by his disability.[4]

---

[2]Defendant's original Motion to Suppress was filed on May, 19, 1997. The Government responded on May, 23, 1997, and supplemented its response on May, 29, 1997. The hearing was held on May 30, 1997. The Government filed a supplemental memorandum on June 3, 1997.

At the hearing of this Motion, the Government affirmed the Court's observation that "this is one of those deals where they threw the case at [the AUSA] at 4:00 on the day before [the hearing]."

[3]The Court notes that some of the evidence now brought forward more closely corroborates Dickerson's account of events than Special Agent Lawlor's. For example, Agent Wenko asserts that he had his weapon drawn when he confronted Dickerson. That is the material point that Dickerson's counsel was trying to elicit from Agent Lawlor at the hearing and about which Agent Lawlor denied knowledge. In addition, the Government's Motion misses the point regarding Agent Lawlor's assertion to Magistrate Judge Kenkel that a telephonic warrant (and an incomplete one at that) was necessary because Dickerson soon would be free to go home and destroy evidence. The Government clearly is correct in arguing that police are not required to arrest any suspect for whom they have probable cause. However, the Government may not use its volitional decision not to arrest as the basis for a claim of exigent circumstances.

[4]The Government begins its plea for reconsideration by asserting that "[a]t stake here is not only our ability to bring Dickerson to book for multiple armed robberies, but also quite possibly an agent's career." More correctly, what is at stake

The district court is uniquely positioned to judge the credibility of a witness before it based on the witness's testimony and all of the evidence properly before it. However, the Court may only make this determination based on evidence that is actually presented.[3]

Because the Government has not proffered any new and heretofore unavailable evidence supporting reversal of this Court's July 1, 1997 Order, the Government's Motion for Reconsideration is DENIED. Because it finds no support in the law, Defendant's Motion for Reconsideration also is DENIED.

An appropriate Order shall issue.

/s/
UNITED STATES DISTRICT JUDGE

August 4, 1997
Alexandria, Virginia

---

here is the liberty of a citizen who is presumed to be innocent and whose constitutionally protected rights were breached by the government. At the end of the day, and regardless of the outcome of the trial of this case, Agent Lawlor will not spend the next several years in prison -- Dickerson may.

[3]While the Government's failure to properly bring its case may be unfortunate for both Agent Lawlor and the immediate interests of justice, the Court owes a greater and abiding duty to protect the judicial processes that in turn protect us all. The Court may not abandon this duty in deference to "its own sense of justice." See United States v. Perkins, 108 F.3d 512, 515 (4th Cir. 1997).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 14, 1999

No. 97-4750
CR-97-159-A

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

CHARLES THOMAS DICKERSON

Defendant - Appellee

WASHINGTON LEGAL FOUNDATION; SAFE STREETS COALITION; OFFICE OF THE PUBLIC DEFENDER FOR THE DISTRICT OF MARYLAND; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION

Amici Curiae

ORDER

Appellee filed a motion to recall and stay the mandate in this matter pending the filing of a petition for writ of certiorari to the United States Supreme Court pursuant to FRAP 41(d).

The Court grants the motion.

FOR THE COURT

/s/ Patricia S. Connor

CLERK

NITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 1, 1999

No. 97-4750
CR-97-159-A

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

CHARLES THOMAS DICKERSON

Defendant - Appellee

WASHINGTON LEGAL FOUNDATION; SAFE STREETS COALITION; OFFICE OF THE PUBLIC DEFENDER FOR THE DISTRICT OF MARYLAND; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION

Amici Curiae

CORRECTED ORDER

The appellee filed a petition for rehearing and rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc.

Judges Murnaghan, Ervin, Michael, Motz, and King voted to rehear the case en banc. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, and Traxler voted to deny rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Williams for the Court.

FOR THE COURT

/s/ Patricia S. Connor

CLERK

ORIGINAL

Supreme Court, U.S.
FILED
NOV 1 1999
CLERK

No. 99-5525

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

JANET RENO
Attorney General

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
LISA S. BLATT
Assistants to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RECEIVED
AFTER HOURS
NOV - 2 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

46 pp

QUESTIONS PRESENTED

1. Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. 3501, notwithstanding that the confession was taken in violation of the requirements of Miranda v. Arizona, 384 U.S. 436 (1966).

2. Whether 18 U.S.C. 3501 was properly considered by the court of appeals when the government had not raised the statute on appeal.

3. Whether the search warrant in this case described the evidence to be seized with sufficient particularity or, if not, whether the agents nonetheless relied in good faith on the warrant, when the warrant authorized a search for "evidence of the crime of bank robbery."

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-5525

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

A grand jury sitting in the Eastern District of Virginia indicted petitioner on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371, three counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and three counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). The district court granted petitioner's motion to suppress statements petitioner made to federal agents and physical evidence seized during the execution of a search warrant at his apartment. Pet. App. 1b-20b. The district court denied the government's motion for reconsideration. Id. at 1c-7c. The government appealed, and the court of appeals reversed. Id. at 1a-28a.

1. On January 24, 1997, the First Virginia Bank in

Alexandria, Virginia, was robbed of approximately $876. The robber carried a silver semi-automatic handgun and a black leather bag. Immediately after the robbery, a witness saw the robber place something into the trunk of a white Oldsmobile Ciera, get into the passenger side of the car, and ride away. The witness observed the getaway car's license plate number, and law enforcement agents determined that the car was registered to petitioner. C.A. App. 13-14, 73, 80-81.

On January 27, 1997, at around 5:30 p.m., a team including agents of the Federal Bureau of Investigation (FBI) and an Alexandria police detective went to petitioner's apartment in Takoma Park, Maryland. Several agents entered the apartment.[1] While the agents were there, FBI Special Agent Lawlor saw a large amount of cash (later determined to be $552) on petitioner's bed. Petitioner refused to allow the agents to search his apartment. Petitioner then accompanied the agents to the FBI field office in Washington, D.C. C.A. App. 14-15, 81-85, 94-96.

Agent Lawlor and Alexandria Detective Durkin interviewed petitioner at the FBI field office in Washington, D.C. Agent Lawlor testified that petitioner initially stated only that he had driven his white Oldsmobile Ciera to the Old Town area of Alexandria at about 10 a.m. to look at a restaurant. Petitioner

[1] At the suppression hearing, the testimony of Special Agent Christopher Lawlor and that of petitioner diverged on several issues. See C.A. App. 81. For example, Agent Lawlor testified that the entry was by consent after he knocked on the door, C.A. App. 5, while petitioner testified that the agents entered without being invited in. C.A. App. 44.

also said that he parked his car and went to get a bagel. Agent Lawlor added that the area in which petitioner was parked was near the scene of the bank robbery. C.A. App. 22, 73. Agent Lawlor testified that he then left the room and obtained by telephone a warrant to search petitioner's apartment for "[e]vidence of the crime of bank robbery." C.A. App. 22, 68-71. Lawlor testified that he returned to the interview room and told petitioner that other agents were about to search his apartment. Lawlor further testified that petitioner was then advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and waived those rights in writing. C.A. App. 25-27, 72.

According to Lawlor, after the waiver, petitioner admitted that he had been with Jimmy Rochester on the morning of the robbery, and that Rochester had previously committed numerous robberies and might have robbed the First Virginia Bank. Petitioner stated that both he and Rochester left petitioner's car to go separate places, and that when he returned, Rochester was already in the car and the two drove away. He also stated that he stopped the car at Rochester's request, and Rochester put something in the trunk. Later, Rochester told him to run a red light, and petitioner began to surmise that Rochester may have robbed a bank. Petitioner also said that later that day Rochester gave him a silver .45-caliber pistol, and that the agents might find the gun and dye-stained money in petitioner's apartment. C.A. App. 27, 73-76. Officers subsequently searched petitioner's apartment and found a .45-caliber handgun, dye-stained money and a bait bill from

another robbery or robberies, ammunition, and masks. C.A. App. 39-41, 85.

2. Petitioner moved to suppress his statements and the evidence seized from his apartment. The district court held a hearing at which Agent Lawlor and petitioner both testified. Petitioner testified that, contrary to Agent Lawlor's testimony, he was not advised of his Miranda rights until after he made all of the statements at issue. Following the hearing, the district court granted petitioner's suppression motions. Pet. App. 1b-20b.[2] With respect to the statements, the district court found that petitioner was in custody during the questioning, and it credited petitioner's testimony that he was not read his Miranda rights and did not execute a waiver until after he made all of the statements at issue. Id. at 15b-20b. The court also suppressed the evidence seized from petitioner's apartment, ruling that the warrant, which authorized a search for "evidence of the crime of bank robbery," was insufficiently particular and could not have been relied on in good faith by the agents executing it. Id. at 8b-15b.

3. The government filed a motion for reconsideration. In support of its motion, the government submitted the affidavit of Detective Durkin, who was present throughout petitioner's interview. In his affidavit, Detective Durkin stated that petitioner had been read Miranda warnings and executed the written

[2] Petitioner also moved to suppress a leather backpack and solvent used to clean dye-stained money, which were recovered from a search of the getaway car. The district court denied that motion. Pet. App. 7b-8b & n.2.

waiver before petitioner gave his more elaborate statement acknowledging his activities with Rochester on the day of the robbery. The government further submitted petitioner's own handwritten statement acknowledging that he had been advised of his rights. C.A. App. 119-122. The government also argued (id. at 110-112) that even if petitioner's statements were elicited in violation of Miranda, they were voluntary and therefore admissible under 18 U.S.C. 3501, which provides in relevant part that "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given," 18 U.S.C. 3501(a), that "[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession," and that the "presence or absence" of any particular factors "need not be conclusive on the issue of voluntariness of the confession," 18 U.S.C. 3501(b).

The district court denied the motion for reconsideration on the ground that the government had failed to establish that the additional evidence it proffered had been unavailable at the time of the suppression hearing. Pet. App. 5c. The district court's written order did not address Section 3501. See id. at 1c-7c.

4. A divided panel of the court of appeals reversed. Pet. App. 1a-28a.

a. With respect to petitioner's statements, the court first held that the district court did not abuse its discretion in denying the government's motion for reconsideration, because the

government had earlier opportunities to offer the evidence. Pet. App. 7a-8a. The court then turned to Section 3501. Although the majority noted that the government explicitly declined to make any argument based on 18 U.S.C. 3501 on appeal, Gov't C.A. Br. 34 n.19, the court held that petitioner's statements were admissible under Section 3501 notwithstanding the absence of prior Miranda warnings. Pet. App. 8a-19a.

The majority stated that "[Section] 3501, rather than the judicially created rule of Miranda," governs the admissibility of confessions in federal court. Pet. App. 17a. The majority noted that Congress had enacted Section 3501 "with the express purpose of legislatively overruling Miranda," id. at 12a, and that Congress had the authority to do so only if the rules set forth in Miranda were not required by the Constitution. Id. at 13a. Relying on cases decided after Miranda in which this Court "referred to the warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution,'" id. at 14a (citations omitted), the court of appeals held:

> As a consequence, the irrebuttable presumption created by the Court in Miranda — that a confession obtained without the warnings is presumed involuntary — is a fortiori not required by the Constitution.
>
> Accordingly, Congress necessarily possesses the legislative authority to supersede the conclusive presumption created by Miranda pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts.

Id. at 16a (footnote omitted). The majority noted the dissent's contention that, under the majority's theory, it remained unexplained how this Court could continue to apply Miranda to state

prosecutions if Miranda is not a constitutional rule. But the majority found that to be an "interesting academic question" that "has no bearing on our conclusion that Miranda's conclusive presumption is not required by the Constitution." Id. at 24a n.21.

The court of appeals therefore reversed the district court's order suppressing petitioner's statements. Pet. App. 19a. Because the district court had refused to suppress the fruits of petitioner's statements, the court of appeals also concluded that the district court had "necessarily found that [petitioner's] statements were voluntary under the Fifth Amendment" and thus admissible under Section 3501. Ibid.[3]

b. Judge Michael dissented in part. He would not have addressed the applicability of Section 3501, because the government had not invoked the statute and the court of appeals did not have the benefit of full briefing and argument on the issue. Pet. App. 25a-27a. In his view, it was "a mistake for our court to push § 3501 into this case." Id. at 27a.

5. Petitioner sought rehearing en banc. The government filed a brief in support of partial rehearing en banc. In that brief (at 12), the government argued that "on the current state of the Supreme Court's Miranda jurisprudence, taken as a whole," the lower federal courts could not properly "conclude that the Miranda rules

---

[3] The court of appeals also reversed the district court's order suppressing the physical evidence seized from petitioner's apartment. Pet. App. 17a-19a. Judge Michael disagreed with the majority's conclusion that the search warrant was sufficiently particular, but agreed that the evidence seized was nonetheless admissible pursuant to the good-faith exception. Id. at 27a-28a.

lack a constitutional footing. * * * [T]he Supreme Court's continued application of the Miranda rulings to the States and on habeas review cannot be explained on any other ground than that the Court regards [the requirements set forth in Miranda] as implementing and effectuating constitutional rights." The government further argued that "[w]hatever retreats there may be in some decisions from Miranda's original constitutional premises, the lower federal courts are bound by Supreme Court holdings unless and until the Supreme Court itself overrules them." Id. at 6 (citing Agostini v. Felton, 521 U.S. 203, 237 (1997)). The government thus concluded that the lower federal courts "may not apply Section 3501 to admit confessions that Miranda would exclude." Id. at 12.

The court of appeals denied rehearing en banc by an 8-5 vote. Pet. App. 1d-2d.

DISCUSSION

1. Petitioner seeks review (Pet. 9-14) of the court of appeals' holding that 18 U.S.C. 3501 supersedes this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). The question whether Congress may supersede Miranda and authorize the admission of an unwarned, but voluntary, statement in the government's case-in-chief is one of exceptional importance that warrants this Court's review.

If the Miranda decision and its progeny represent an exercise of this Court's authority to implement and effectuate constitutional rights, those decisions are binding on Congress. See City of Boerne v. Flores, 521 U.S. 507, 516-529 (1997).

Accordingly, the crucial issue in deciding whether 18 U.S.C. 3501 can supersede Miranda is whether the Miranda rulings are constitutionally based or, alternatively, represent only supervisory "rules of procedure and evidence." Pet. App. 3a. This Court's case law since Miranda has, we believe, created considerable confusion over the precise nature of the Miranda rules and the constitutional source of the Court's authority to pronounce and apply them. Nevertheless, we believe that the body of this Court's existing decisions on the issue requires the conclusion that Miranda implements and protects constitutional rights. Critical to that conclusion is the fact that the Court has consistently applied Miranda to the States and on federal habeas review of state convictions - applications that can only be justified on the premise that Miranda states a rule of constitutional law.

Because the Miranda decision is of constitutional dimension, Congress may not legislate a contrary rule unless this Court were to overrule Miranda. We submit that principles of stare decisis do not favor the overruling of Miranda, and we do not request the Court to take that step. In the thirty-three years since that decision was handed down, it has become embedded in the law and refined through the decisions of this Court. We acknowledge that there is a profound cost to the truthfinding function of a criminal trial when reliable evidence is suppressed. That value necessarily must weigh heavily in this Court's appraisal of the continued validity of Miranda. In many respects, however, Miranda is

beneficial to law enforcement. On balance, we do not believe that the developments since Miranda warrant reexamination of the essence of the balance that the Court has struck between the needs of law enforcement and the rights of a suspect.[4] Accordingly, Section 3501 cannot constitutionally authorize the admission of a statement that would be excluded under this Court's Miranda cases.

a. The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." In Miranda, the Court held that

---

[4] That balance has been described as follows:

> Custodial interrogations implicate two competing concerns. On the one hand, the need for police questioning as a tool for effective enforcement of criminal laws cannot be doubted. Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is inherently coercive and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. Miranda attempted to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

Moran v. Burbine, 475 U.S. 412, 426-427 (1986) (citations and internal quotation marks omitted).

statements stemming from custodial interrogation of a suspect are inadmissible at trial unless the police first provided the suspect with a set of four specific warnings.[5] 384 U.S. at 444. The Court noted that, while it might not find statements taken without the warnings "to have been involuntary in traditional terms," id. at 457, procedural safeguards were necessary because custodial interrogation is inherently coercive, and that, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Id. at 458; see id. at 467.

In resolving the "constitutional issue" of the "admissibility of statements obtained from a defendant questioned while in custody," 384 U.S. at 445, Miranda made clear that the safeguards it adopted were not themselves constitutional rights. The Court said: "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." Id. at 490. But, the Court continued, "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a

---

[5] Those warnings are that (1) the defendant has the right to remain silent; (2) any statement he makes may be used as evidence against him; (3) he has the right to the presence of an attorney; and (4) if he cannot afford an attorney, one will be appointed for him. 384 U.S. at 479.

defendant." Id. at 476; see also id. at 491 ("Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.").

In 1968, Congress enacted Section 3501 with the express purpose of overturning Miranda. Congress did not accept the Court's invitation to devise an alternative procedural safeguard for Fifth Amendment rights; rather, it sought through Section 3501 to restore the test for admissibility of custodial statements that prevailed before Miranda. See S. Rep. No. 1097, 90th Cong., 2d Sess. 51 (1968). Under Section 3501, the question whether the police warned a suspect held in custody of his constitutional rights before interrogating him is treated, as it was before Miranda, as one of several non-exclusive factors to be considered in determining voluntariness. See, e.g., Haynes v. Washington, 373 U.S. 503, 516-517 (1963) (considering absence of warnings about right to remain silent, that statements could be used against suspect, and that suspect had right to counsel in assessing voluntariness under the Due Process Clause).

The court of appeals concluded that Congress is free to supersede Miranda because this Court's decisions reveal that Miranda's requirements are not based in the Constitution. Pet. App. 14a-16a. We do not agree. The Court in Miranda clearly rested its holding on the Fifth Amendment, explaining that in the four cases that were before the Court in Miranda, the unwarned confessions "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the

privilege." 384 U.S. at 491; accord id. at 439, 458, 467, 477. It is true that the Court has retreated from that aspect of its reasoning in Miranda. In a line of cases beginning with Michigan v. Tucker, 417 U.S. 433 (1974), the Court has held that a failure to apply Miranda's interrogation safeguards is not per se a constitutional violation and that a statement will not invariably be deemed "compelled" in violation of the Fifth Amendment privilege against compelled self-incrimination simply because it was unwarned. In Tucker, the Court declined to suppress the testimony of a witness whose identity was learned from a statement taken in violation of Miranda, because the Court found that the police conduct at issue did not "breach the right against compulsory self-incrimination[,] * * * but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege." 417 U.S. at 445-446.

Since Tucker, this Court has frequently observed that the Miranda rules are "prophylactic" in character and that an unwarned statement is not necessarily "compelled" in violation of the Fifth Amendment. See, e.g., Davis v. United States, 512 U.S. 452, 457 (1994); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Connecticut v. Barrett, 479 U.S. 523, 528 (1987). Consistent with the description of Miranda's procedures as prophylactic, in Oregon v. Elstad, 470 U.S. 298 (1985), the Court declined to suppress the fruits of an unwarned statement, emphasizing that the "fruit of the poisonous tree" doctrine "assumes the existence of a constitutional violation" (id. at 305), but that "[t]he Miranda exclusionary rule

* * * may be triggered even in the absence of a Fifth Amendment violation." Id. at 306. The Court has also recognized a "public safety" exception to Miranda's "prophylactic rule," stressing that a violation of the procedural safeguards of Miranda is not itself a violation of the Fifth Amendment. New York v. Quarles, 467 U.S. 649, 657 (1984). And the Court has concluded that unwarned statements may be used to impeach the defendant at trial notwithstanding the violation of Miranda, if the traditional test for "voluntariness" is satisfied. See Oregon v. Hass, 420 U.S. 714, 722-723 (1975); Harris v. New York, 401 U.S. 222, 224 (1971).

Considered in isolation, the language used in Tucker and its progeny that a violation of Miranda is not a violation of the Constitution could be read to support an inference that Miranda is not a constitutional rule. Indeed, the Fourth Circuit read those statements to mean that Miranda is simply a "judicially created rule" that may be supplanted by legislation. Pet. App. 17a. We agree that these statements generate tension within the Court's Miranda decisions. A well-established line of this Court's cases, however, requires the conclusion that Miranda, as applied by this Court, does indeed rest on a constitutional basis.

Beginning with Miranda itself, this Court has repeatedly applied the warnings requirement, and its associated suppression remedy, to cases arising in state courts.[6] See, e.g., Stansbury v.

[6] Three of the four consolidated cases in Miranda itself arose in state courts, as did Tucker, Elstad, Quarles and other cases on which the court of appeals relied in concluding that Miranda lacks a constitutional basis. The fourth of the (continued...)

California, 511 U.S. 318 (1994) (per curiam); Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988); Edwards v. Arizona, 451 U.S. 477, 481-482 (1981). Although this Court has the power to announce rules of procedure and evidence binding on federal courts, it has consistently disclaimed — both before and after Miranda — any such supervisory authority over state courts. The Court's authority in state cases "is limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991). See Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."). Because federal judges "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution," Harris v. Rivera, 454 U.S. 339, 34[illegible]-345 (1981) (per curiam), the Court's continued application of Miranda's exclusionary rule in state cases necessarily means that Miranda rests on the Court's authority to apply the Constitution.

The same point is manifest in this Court's holding that claims of Miranda violations are cognizable on federal habeas review. See Withrow v. Williams, 507 U.S. 680, 690-695 (1993); see also Thompson v. Keohane, 516 U.S. 99 (1995). Habeas corpus is available only for claims that a person "is in custody in violation

(...continued)
consolidated cases in Miranda involved a federal conviction (Westover v. United States, No. 761).

of the Constitution or the laws or treaties of the United States." 28 U.S.C. 2254(a). Because Miranda is not a "law" or a treaty, the Court's holding in Withrow necessarily depends on the premise that the requirements of Miranda implement and protect constitutional rights.

Significantly, this Court has regularly described the Miranda holding, and subsequent extensions of that holding, as resting on constitutional grounds. See, e.g., Illinois v. Perkins, 496 U.S. 292, 296 (1990) (describing Miranda rules as resting on "the Fifth Amendment privilege against self-incrimination"); Butler v. McKellar, 494 U.S. 407, 411 (noting holding of Arizona v. Roberson "that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation"); Michigan v. Jackson, 475 U.S. 625, 629 (1986) ("The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations."); Moran v. Burbine, 475 U.S. 412, 427 (1986) (describing Miranda as "our interpretation of the Federal Constitution"); Edwards v. Arizona, 451 U.S. 477, 481-482 (1981) (describing Miranda as having "determined that the Fifth and Fourteenth Amendments[]" required custodial interrogation to be preceded by advice concerning the suspect's rights). As those cases highlight, the Court's description of the Miranda rules as "prophylactic" does not mean that the rules are therefore extra-constitutional. As the Court stated in Withrow: "'[p]rophylactic' though it may be, in protecting a defendant's Fifth Amendment

privilege against self-incrimination, Miranda safeguards 'a fundamental trial right.'" 507 U.S. at 691 (emphasis omitted).

The court of appeals in this case did not confront the import of this Court's application of Miranda to the States and on habeas review, nor did the court address the Court's own description of the Miranda-based holdings as constitutional in nature. Rather, the court stated that, although it "raises an interesting academic question," this Court's application of Miranda in state prosecutions "has no bearing on our conclusion that Miranda's conclusive presumption is not required by the Constitution." Pet. App. 24a n.21. Any conclusion about the legal source of Miranda, however, must take into account the Court's application of that case to the States, since this Court could not do so if Miranda were a non-constitutional rule of procedure or evidence.

In sum, this Court's Miranda jurisprudence establishes that the Miranda rules, as applied by the Court, have a constitutional foundation. The specific warnings required by Miranda are not themselves mandated by the Fifth Amendment. But this Court's continued application of the Miranda rulings to the States and on habeas review cannot be explained on any other ground than that the Court regards them as implementing and effectuating constitutional rights. Because Miranda is of constitutional dimension, it cannot be superseded merely by legislation. See City of Boerne v. Flores, 521 U.S. at 516-528; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Accordingly, before Section 3501 could be applied in a manner that is inconsistent with this Court's Miranda

jurisprudence, the Court would have to reconsider and overrule Miranda.

b. The resolution of whether Miranda should be overruled or reaffirmed raises fundamental questions and implicates competing interests of the highest order. Weighing those interests is not an easy task. But in our view, sound application of principles of stare decisis dictates that at this point in time, thirty-three years after Miranda was decided and many years after it has been absorbed into police practices, judicial procedures, and the public understanding, the Miranda decision should not be overruled. As Chief Justice Burger stated nineteen years ago: "The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it, nor extend it at this late date." Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." Vasquez v. Hillary, 474 U.S. 254, 265-266 (1986). While "stare decisis is not an 'inexorable command,'" especially in a constitutional case, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992), "[e]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'" United States v.

International Business Machines Corp., 517 U.S. 843, 856 (1996). Among the factors considered in stare decisis analysis are the costs and workability of the prior decision, developments in the law that have affected the validity of the past precedent, and changes or perceived changes in the factual premises underlying the precedent. See, e.g., Casey, 505 U.S. at 854-855; Payne v. Tennessee, 501 U.S. 808, 827-830 (1991); Vasquez v. Hillery, 474 U.S. 254, 265-266 (1986). In addition, in a case involving a decision of the significance of Miranda, larger considerations of the continuing value of the decision enter into the calculus as well. Cf. Casey, 505 U.S. at 861.[7]

(i.) Costs and Workability. The core holding of Miranda is that statements that are obtained in custodial interrogation are inadmissible in the prosecution's case-in-chief unless the suspect, before speaking, was given the prescribed warnings and waived his rights to remain silent and to consult counsel. Any consideration of whether that holding should be overruled must begin with an assessment of Miranda's costs and benefits, and whether Miranda has proven workable in practice.

There are undeniably instances in which the exclusionary rule of Miranda imposes costs on the truth-seeking function of a trial,

---

[7] Reliance interests are also an important factor, and rules of criminal procedure do not in general give rise to substantial reliance interests. See Payne v. Tennessee, 501 U.S. 808, 828 (1991). It is unlikely that there are any criminal defendants who gave unwarned confessions in reliance on the belief that they would not be used in the prosecution's case-in-chief. As we note below, however, see p. 36, infra, it is of significance that the requirements of Miranda have shaped years of police conduct and governed decades of criminal prosecutions.

by depriving the trier of fact of "what concededly is relevant evidence." Colorado v. Connelly, 479 U.S. 157, 166 (1986); see also, e.g., McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); Michigan v. Harvey, 494 U.S. 344, 350 (1990) (Miranda's exclusionary rule "result[s] in the exclusion of some voluntary and reliable statements"); Oregon v. Elstad, 470 U.S. 298, 312 (1985) (loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement").[8] In our view, however, the inevitable cost of Miranda's exclusionary rule does not so impede or undermine law enforcement that the overruling of Miranda is warranted. Rather, the judgment and experience of federal law enforcement agencies is that Miranda is workable in practice and serves several significant law enforcement objectives. Indeed, in the thirty-one years since the enactment of Section 3501, the United States has never asked this Court to reconsider its decision in Miranda.

Miranda's core procedures are not difficult to administer.

[8] The Court has made the same point in discussing the Fourth Amendment exclusionary rule. See, e.g., Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 364 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions."); United States v. Leon, 468 U.S. 897, 907 n.6 (1984) ("The substantial social costs exacted by the exclusionary rule * * * have long been a source of concern. * * * 'Any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.'") (quoting Illinois v. Gates, 462 U.S. 213, 257-258 (1983) (White, J., concurring)).

Federal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions. And the administration of Miranda warnings is useful, for a defendant who waives his rights will often forego any challenge to the admissibility of an ensuing confession. In those instances in which such challenges nonetheless are made, compliance with Miranda helps ensure that statements will be deemed admissible because they were voluntary. Indeed, long before Miranda was decided, the Federal Bureau of Investigation had adopted a practice of administering warnings similar to those required by Miranda to all suspects before questioning them. See 384 U.S. at 483-488 & n.34. That practice was instituted to ensure that suspects are treated fairly while simultaneously obtaining important investigative information and reliable statements that are admissible in court. See id. at 483 n.54 (noting statement of J. Edgar Hoover, then-Director of the FBI, explaining that the FBI's policy of giving warnings was based on the principle that "[l]aw enforcement, * * * in defeating the criminal, must maintain inviolate the historic liberties of the individual.") The FBI's policy was workable before Miranda, and the FBI has had very little difficulty complying with the bright-line core mandates of the Miranda decision since 1966.

The experience of other federal law enforcement agencies since Miranda has also confirmed that Miranda has proved workable in practice and is in many respects beneficial to law enforcement. It is the policy of some agencies, such as the Internal Revenue

Service and the Bureau of Alcohol, Tobacco, and Firearms, to provide Miranda warnings not only before engaging in custodial interrogation, but also in at least some non-custodial settings. The experience of those agencies is that the core Miranda warnings and waiver framework is administrable and does not impede law enforcement. In short, federal law enforcement agencies have concluded that the Miranda decision itself generally does not hinder their investigations and the issuance of Miranda warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect.

This Court has frequently noted that it is a virtue of Miranda that it affords bright-line rules that can be readily applied by the police and the courts to a large variety of factual circumstances.[9] Indeed, even when, as in Quarles, the Court created an exception to the Miranda rules for public safety, the Court explained that "the exception will not be difficult for

[9] See Withrow v. Williams, 507 U.S. 680, 695 (1993) ("There is little reason to believe that the police today are unable, or even generally unwilling, to satisfy Miranda's requirements."); Arizona v. Roberson, 486 U.S. 675, 681 (1988) ("We have repeatedly emphasized the virtues of a bright-line rule in cases following Edwards, as well as Miranda."); Moran v. Burbine, 475 U.S. 412, 425 (1986) ("As we have stressed on numerous occasions, '[o]ne of the principal advantages' of Miranda is the ease and clarity of its application."); Berkemer v. McCarty, 468 U.S. 420, 432 (1984) (noting "the simplicity and clarity" of Miranda); Fare v. Michael C., 442 U.S. 707, 718 (1979) (Miranda's "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in Miranda imposes on law enforcement agencies and the courts."); see also New York v. Quarles, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment and dissenting in part) (Miranda rules have "afforded police and courts clear guidance on the manner in which to conduct a custodial investigation.").

police officers to apply," 467 U.S. at 658, that "police officers can and will distinguish almost instinctively" between questions permitted and prohibited under the exception, id. at 658-659, and that the exception will "simply free [police officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety," id. at 659.

While Miranda itself is generally workable, federal law enforcement agencies have encountered difficulties with some of the extensions of Miranda in Edwards v. Arizona, 451 U.S. 477, 480 (1981), and later cases. Those cases require that, once a suspect invokes his right to counsel during custodial interrogation, law enforcement agents may not later reinitiate questioning, even on matters unrelated to the crime for which the suspect was being held and questioned. See Arizona v. Roberson, 486 U.S. 675 (1988); Minnick v. Mississippi, 498 U.S. 146 (1990). Whatever difficulty is caused by those decisions, however, is more properly charged to the account of Edwards and Roberson than to Miranda, and any such difficulty would properly be far more relevant should the Court be faced with reconsideration of those decisions rather than Miranda itself.[10] The Miranda doctrine has undergone a continuous course

[10] The Court has already tailored the Miranda doctrine as necessary to make it more workable. See, e.g., Davis v. United States, 512 U.S. 452 (1994) (ambiguous invocation of right to counsel does not require cessation of all questioning); Berkemer v. McCarty, 468 U.S. 420 (1984) (Miranda warnings not required in a routine traffic stop); New York v. Quarles, 467 U.S. 649, 657 (1984) (public safety exception). The Court has not recently decided an Edwards issue, but in United States v. Green, 504 U.S. 908 (1992) (No. 91-5121), the Court granted certiorari to review "[w]hether Edwards * * * requires the suppression of a voluntary

(continued...)

of development in this Court since 1966. Insofar as it is shown that some applications of Miranda create inequity or are otherwise unworkable, there is no reason to believe that the doctrine will not continue to develop in future years as appropriate.[11]

Finally, a return to a totality-of-the-circumstances test in all settings is unlikely to be more workable in practice than is the Miranda rule itself. The underlying Fifth Amendment rule that confessions are inadmissible unless they are found voluntary under the traditional totality-of-the-circumstances test remains applicable, even if the Miranda warnings have been administered. See, e.g., Miller v. Fenton, 474 U.S. 104 (1985). As a general

[10](...continued)
confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation." The case became moot after oral argument when respondent died. See 507 U.S. 545 (1993). Had the case not become moot, the Court would have decided whether a further refinement to the Edwards-Roberson rules was appropriate.

[11] Another problem that can occur in applying Miranda is that officers who have detained or are questioning a suspect without arresting him may be found by a court to have applied a "restraint on freedom of movement of the degree associated with a formal arrest." Thompson v. Keohane, 516 U.S. 99, 112 (1995) (internal quotation marks and citations omitted). In that situation, an officer may inadvertently fail to issue Miranda warnings. As this Court has noted, "the task of defining 'custody' is a slippery one, and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.'" Oregon v. Elstad, 470 U.S. 298, 309 (1985). It therefore stands to reason that in some close cases, the officers will make a mistake, but it will be a "reasonable" one under all the circumstances. While the Court has not considered whether to recognize an exception to Miranda in such a case, it has adopted a rule in the Fourth Amendment exclusionary rule context for cases in which police acted in good-faith reliance on a warrant or authorization by another governmental actor. See United States v. Leon, 468 U.S. 897, 906-913 (1984); Arizona v. Evans, 514 U.S. 1, 15 (1995).

matter, however, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." Berkemer v. McCarty, 468 U.S. at 433 n.20. In the absence of Miranda, it is thus likely that additional pressure would be placed on the voluntariness doctrine. Although many law enforcement agents would no doubt continue to follow the Miranda procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings and that some police officers would, in the "often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), fail to issue warnings before conducting custodial interrogation. The result would likely be an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard, which takes into account not only what the agents say and do, see, e.g., Miller, 474 U.S. at 116, but also facts about the particular suspect (such as his maturity, education, physical condition, mental health, and knowledge of constitutional rights, see Withrow, 507 U.S. at 693 (citing cases)), about the circumstances of the questioning (the length of the detention, the length and nature of the interrogation, the physical constraints or deprivations imposed, the suspect's access to friends and relatives, see id. at 693-694; Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Miranda, 384 U.S. at 445-446, and other factors. Such a voluntariness inquiry would likely be

more difficult and uncertain in application than Miranda.

(ii.) Relationship to Related Principles of Law. Perhaps the feature of Miranda that has raised the greatest doctrinal doubt about that decision's validity is the tension that has emerged in this Court's cases that followed the Miranda decision itself. The Court has consistently premised those decisions on the proposition that Miranda's holding requires the suppression of unwarned statements in the government's case-in-chief in state and federal cases.[12] And the Court has never suggested that the core holding of Miranda should be overruled. Indeed, if this Court were to overrule Miranda, it would not only have to disavow the reasoning of virtually all of its cases that have addressed the Miranda rule, but would also have to overrule directly at least eleven cases that have reaffirmed that a confession obtained in violation of Miranda must be suppressed in the government's case-in-chief.[13]

---

[12] The one exception is the Court's holding in New York v. Quarles, 467 U.S. 649 (1984), recognizing a "public safety" exception to Miranda. But that case did not question the general rule against the use of unwarned statements in the government's case-in-chief, which the Court restated the following year in Oregon v. Elstad, 470 U.S. 258, 306-307 (1985).

[13] Thompson v. Keohane, 516 U.S. 99 (1995) (holding that whether a suspect is "in custody" for Miranda purposes is a mixed question of law and fact deserving independent federal court review); Withrow v. Williams, 507 U.S. 680 (1993) (holding Miranda claims are cognizable on collateral review); Minnick v. Mississippi, 498 U.S. 146 (1990) (suppressing statement given after defendant had requested and been provided counsel, but while counsel was not present); Pennsylvania v. Muniz, 496 U.S. 582 (1990) (suppressing unwarned response to question asked during station house sobriety test); Arizona v. Roberson, 486 U.S. 675 (1988) (suppressing statement given during police-initiated interrogation following suspect's request for counsel, even though interrogation was in the context of a separate investigation); (continued...)

The Court's decisions limiting the application of Miranda's suppression rule outside of the government's case-in-chief, however, have led some observers to conclude that Miranda has lost its character as a rule that protects constitutional rights. The Court's decisions in Tucker and later cases rest on the conclusion that the procedural safeguards of Miranda are not required by the Constitution and that a violation of Miranda's prophylactic rules does not necessarily produce statements that are themselves "compelled." That reasoning is the foundation of this Court's holdings that unwarned, but voluntary, statements may be used for impeachment and for the acquisition of derivative evidence that may be admitted at trial.[14] Since the Court has said that Miranda violations do not necessarily involve a violation of the Constitution, the question arises whether this Court has properly determined to apply a suppression remedy in the government's case-

---

[13](...continued)
Berkemer v. McCarty, 468 U.S. 420 (1984) (holding unanimously that Miranda applies to questioning on misdemeanor charges); Smith v. Illinois, 469 U.S. 91 (1984) (per curiam) (holding that defendant's responses to questions asked after he requested counsel cannot be used to cast doubt on clarity of his original request); Edwards v. Arizona, 451 U.S. 477 (1981) (holding that once defendant requests counsel, all questioning must cease); Estelle v. Smith, 451 U.S. 454 (1981) (suppressing unwarned statements given during court-ordered competency examination); Orozco v. Texas, 394 U.S. 324 (1969) (suppressing unwarned statement taken while the suspect was in his own bed but after he had been arrested); Mathis v. United States, 391 U.S. 1 (1968) (suppressing unwarned statement elicited by IRS agent during prison interview).

[14] In contrast, statements "compelled" under a grant of immunity may generally not be used, consistent with the Fifth Amendment, either for impeachment, see New Jersey v. Portash, 440 U.S. 450, 458-459 (1979), or for the acquisition of derivative evidence that may be introduced against the defendant, see Kastigar v. United States, 406 U.S. 441 (1972).

in-chief in all prosecutions, federal and state, for the violation of judicially imposed prophylactic rules.

In our judgment, the Court's statements that Miranda's "prophylactic" requirements sweep more broadly than does the Self-Incrimination Clause itself does not invalidate Miranda's status as a Fifth Amendment decision. The Court has long recognized that the objective of requiring Miranda warnings "is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the Miranda warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of the suspect's Fifth Amendment rights." Moran v. Burbine, 475 U.S. 412, 425 (1986).

It is worth recalling that this Court adopted the procedural safeguards of Miranda only after more than thirty years of applying a case-by-case voluntariness test. That judicial experience led the Court to conclude that Fifth Amendment rights in the custodial interrogation setting could not adequately be protected through case-specific adjudication of claims of police coercion, and that procedural safeguards were required. See, e.g., Haynes v. Washington, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements

on the mind and will of an accused."). While there is room for debate about the wisdom of the Court's adoption of various prophylactic constitutional rules, the Court has explained how Miranda's status as a prophylactic rule is linked to the constitutional provision on which it is based.

In Oregon v. Elstad, supra, the Court described the relationship of the Miranda rules, as explicated in the subsequent cases that recognized their "prophylactic" character, to the Self-Incrimination Clause. The Court explained that the "[f]ailure to administer Miranda warnings creates a presumption of compulsion [that is] * * * irrebuttable for purposes of the prosecution's case in chief." 470 U.S. at 307. Because a confession obtained in violation of Miranda is subject to an "irrebuttable presumption of compulsion" in the prosecution's case-in-chief, the suppression of confessions in that context is consistent with the Self-Incrimination Clause's requirement that a person not be "compelled" to be a witness against himself. It is true, of course, that establishment of such a conclusive presumption is a rule of law that the Court has crafted to administer litigation of Fifth Amendment issues. But that does not detract from its basis in the Court's interpretation of the Constitution.[15]

The Court in Elstad also noted that, because outside the government's case-in-chief a confession obtained in violation of

---

[15] See Elstad, 470 U.S. at 306-307 n.1 ("A Miranda violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements [in the government's case-in-chief].")

Miranda is subject only to a rebuttable presumption of compulsion, an unwarned confession may be used for impeachment or to obtain evidence. 470 U.S. at 307 ("But the Miranda presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."). The rule in those settings thus permits use of the confession so long as the presumption of compulsion is overcome by a showing under the totality of the circumstances that the statement was made voluntarily. Ibid.; see Lego v. Twomey, 404 U.S. 477, 489 (1972).

There are other contexts in which this Court similarly has recognized prophylactic rules that are designed to protect constitutional rights, even when those rules may sweep more broadly than the constitutional right upon which they are based.[16] In Michigan v. Jackson, 475 U.S. 625, 636 (1986), the Court held that,

[16] We note that in most criminal settings, the often-heavy costs of such prophylactic rules do not outweigh the potential marginal protection they offer for the underlying constitutional right. Ordinarily, therefore, this Court requires proof of an individualized constitutional harm before framing a remedy. See, e.g., United States v. Morrison, 449 U.S. 361, 364 (1981). And, because judicially devised prophylactic rules are designed merely to provide sufficient protection for the underlying constitutional right, the legislature's adoption of alternative and equally effective safeguards would be valid. See Miranda, 384 U.S. at 467 (noting that the Miranda rules must be observed "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."). That does not, however, deprive the Miranda rules of their constitutional status; it merely suggests the possibility that the Constitution's commands may be satisfied in alternative ways. See also United States v. Wade, 388 U.S. 218, 239 (1967) (regulations and procedures that eliminate the possibility of abuse at lineups may also eliminate the otherwise applicable constitutional requirement that counsel be present at post-arraignment lineups).

once a defendant has invoked his Sixth Amendment right to counsel at an arraignment or similar proceeding, "any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." In Michigan v. Harvey, 494 U.S. 344 (1990), however, the Court held that such invalidity requires suppression of a confession obtained in violation of Jackson only in the prosecution's case-in-chief, but not when it is offered for impeachment purposes. The Court explained that distinction on the ground that Jackson is "not compelled directly by the Constitution," 494 U.S. at 351-352, but sets forth a "prophylactic rule," id. at 345, 346, 349, 351, 353, "designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel," id. at 351. The Court acknowledged in Harvey that the rationale of this line of Sixth Amendment decisions based on the rationale underlying Miranda. See 494 U.S. at 349-352.[17]

Similarly, in North Carolina v. Pearce, 395 U.S. 711 (1969), the Court held that an increased sentence imposed on a defendant after a successful appeal and reconviction is presumed to be the

[17] Another example of a prophylactic rule is the Confrontation Clause doctrine of Bruton v. United States, 391 U.S. 123 (1968), which forbids the admission of a nontestifying codefendant's confession in a joint trial, even with a limiting instruction, to avoid the risk that it will be misused by the jury. See Gray v. Maryland, 523 U.S. 185, 189, 192, 197 (1998) (referring to "protective rule" of Bruton). Although some juries might be able to follow a limiting instruction, the Court concluded that the risk that many may not do so warranted a conclusion that the Confrontation Clause itself protects the defendant against the latter possibility. But in a situation where competing values outweigh that risk, the co-defendant's confession may be used. See Tennessee v. Street, 471 U.S. 409 (1985) (confession that is inadmissible under Bruton rule is admissible for impeachment).

product of vindictiveness and therefore unconstitutional unless non-vindictive reasons for the increased sentence appear on the record. The Court has explained that Pearce is a "prophylactic rule" and has noted the similarities between the "prophylactic rules" in Pearce and Miranda. Michigan v. Payne, 412 U.S. 47, 53-54 (1973); see also Wasman v. United States, 468 U.S. 559 (1984); United States v. Goodwin, 457 U.S. 368, 372-377 (1982); Colten v. Kentucky, 407 U.S. 104, 116 (1972). The Court reached a similar conclusion in Blackledge v. Perry, 417 U.S. 21 (1974), holding that a State may not respond to a defendant's attempt to seek a trial de novo in a higher tier of a two-tier court system by charging the defendant with a more serious offense. The Court has recognized that the rules announced in Pearce and Blackledge, like the rules in Miranda and Jackson, require a decision in favor of the defendant in some cases even though the underlying constitutional right being protected may not have been violated in a particular case.[18] But the Court determined that such rules were necessary to the effectuation of the Constitution.[19]

---

[18] See Blackledge, 417 U.S. at 27 (applying the rule notwithstanding that there was "no evidence that the prosecutor in this case acted in bad faith or maliciously"); Payne, 412 U.S. at 54 (noting that Pearce adopted presumption of vindictiveness notwithstanding that "nothing in Pearce intimates that the Court regarded [judicial vindictiveness] as anything more than an infrequently appearing blemish on the sentencing process").

[19] The Court has also adopted constitutional prophylactic rules that predictably overprotect constitutional rights in a variety of other settings. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 342 (1974) (explaining that, even though "there is no constitutional value in false statements of fact," the Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its (continued...)

Our point is not that such rules are always correct, or that prophylactic rules in a criminal case that lead to the suppression of evidence are often justified. See note 16, supra. In a criminal case, especially where such a rule leads to suppression, it imposes heavy costs on the central truth-finding function of a trial. Thus, no such rule should be adopted without a convincing justification. Nonetheless, prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication. Miranda is distinctive in the detail with which the Court specified particular procedural safeguards. But Miranda's adoption of a prophylactic rule, which has since been applied where necessary but not where its adverse effects would outweigh any benefits, does not uniquely depart from the Court's constitutional jurisprudence.

(iii.) Change in Factual Premises. There appear to be at least two key factual assumptions underlying Miranda. First, "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures." 384 U.S. at 467. Second, "without proper safeguards" -- provided by the administration of the Miranda warnings -- there is a great risk that those pressures may "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so

---

[19](...continued)
progeny nevertheless "extended a measure of strategic protection to defamatory falsehood" in cases involving public officials and public figures); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (setting forth "procedural safeguards designed to obviate the dangers of a censorship system" with respect to motion picture obscenity).

freely." Ibid. Debate concerning each of those premises is possible, as it was at the time Miranda was decided. The inquiry for purposes of stare decisis, however, focuses on changes in circumstance, because the rule of stare decisis would provide little stability if the factual premises of previous decisions were constantly subject to reconsideration, even when the evidence showed no change of circumstance.[20] We cannot conclude that the passage of time or other developments in our society have substantially altered the validity of either of the factual premises on which Miranda was based.

The Court's perception of custodial interrogation as inherently coercive was based on the Court's prior "voluntariness" cases and its review of police interrogation manuals. See Miranda, 384 U.S. at 445-456. The Court's conclusion was not driven solely by cases of physical abuse; to the contrary, the Court "stress[ed] that the modern practice of in-custody interrogation is psychologically rather than physically oriented." Id. at 448. Custodial interrogation is an important and necessary procedure of law enforcement, and law enforcement agents today are generally better trained than they were in 1966. It cannot be said, however,

---

[20] In a companion federal case decided with Miranda, the United States argued that, in deciding whether a suspect's statements during in-custody questioning were the product of compulsion, the Court should require consideration of the totality of the circumstances, rather than adopting a constitutional rule turning on the presence or absence of warnings. Brief for the United States, Westover v. United States, No. 761, at 28-38 (filed February 1966). The calculus of whether to retain Miranda's rule with respect to unwarned statements, thirty-three years after the Court announced it, presents very different considerations.

that the interrogation process is so uniformly different now than at the time of Miranda that changes have undercut the validity of that decision.

With respect to the warnings as an effective antidote to the inherently coercive pressures perceived by the Court in Miranda, there has also been little change in circumstance. Some modern technologies -- videotaping, for example -- could offer promise in documenting that a particular confession was not affected by any coercion inherent in the custodial setting. But no assurance exists that such technological substitutes could provide a suitable replacement for the by-now well-understood Miranda warnings on a large-scale basis. Nor does the widespread public familiarity with the Miranda warnings suggest that they are no longer necessary. If Miranda were overruled, it is difficult to predict how long that familiarity would persist.[21] And even if a suspect held in custody already knows of his rights, the Court in Miranda believed that the provision of warnings in each case "show[s] the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." Id. at 468. Once again, there is no basis for a conclusion that changed circumstances or a changed perception of the facts warrants reassessment of that view.

---

[21] Federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of Miranda. We are unable to predict whether state and local law enforcement would do so. More to the point here, there would be no basis for the Court to draw a firm conclusion about what practices would ensue were it to overrule Miranda.

* * * * *

In considering whether the Court should revisit Miranda, it is appropriate to make an observation that transcends the usual factors considered under the rubric of stare decisis. In our view, Miranda has come to play a unique and important role in the nation's conception of our criminal justice system: it promotes public confidence that the criminal justice system is fair. Overruling Miranda -- at this juncture, more than three decades after it was announced and after law enforcement has accommodated to its basic requirements -- would thus tend to undermine public confidence in the fairness of that system. The law enforcement system depends on citizen cooperation and support in myriad ways. Steps that may damage that confidence should not be taken lightly.

There is no doubt that the public pays a heavy price if technical violations of Miranda result in suppression of otherwise-reliable evidence, and non-prosecution or acquittal of felons ensues. But there are benefits of Miranda as well, in establishing clear guidelines of conduct for agents, facilitating the admission of confessions that follow administration of the warnings, bolstering the credibility of such confessions in the eyes of jurors, and generally contributing to the perceived fairness of the criminal justice system. The stability of this Court's constitutional jurisprudence is also important to the system of justice. Especially in light of those factors, we do not urge the

Court that Miranda be overruled.[22]

2. Petitioner also contends (Pet. 15-17) that the court of appeals erred by reaching the applicability of 18 U.S.C. 3501 sua sponte and by failing, in any event, to conclude that the district court did not commit plain error in declining to consider it. The path by which the court of appeals reached its decision is unusual. The government did not raise Section 3501 in the district court until moving for reconsideration, and it did not raise Section 3501 on appeal at all.[23] For its part, the court of appeals declined to require the district court to consider the evidence presented in the government's motion for reconsideration that petitioner was read and waived his Miranda rights before making the substance of the statements that were the subject of the suppression order. Instead, the court sua sponte reached the constitutional question raised by Section 3501.[24]

---

[22] We note, pursuant to Section 21(c) of Pub. L. No. 96-132, 93 Stat. 1049-1050 (1979), as apparently extended to the past fiscal year by Pub. L. No. 105-277, § 102, 112 Stat. 2681-66, that the position of the Department of Justice set forth in this brief regarding the constitutionality of Section 3501 constitutes the position of the executive branch of the United States.

[23] As Judge Michael noted in his dissent (Pet. App. 25a), the government's decision on appeal not to invoke Section 3501 is consistent with the virtually unbroken practice of the government since the enactment of the statute. See Davis v. United States, 512 U.S. 452, 463-464 (1994) (Scalia, J., concurring) ("[W]ith limited exceptions the provision has been studiously ignored by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago.").

[24] We continue to believe that the court of appeals erred in concluding that it was free to depart from this Court's decision in Miranda based on a perception that that case was undermined by other precedents, see Agostini v. Felton, 521 U.S. at 237-238, and

(continued...)

The court of appeals' action is subject to question on prudential grounds. While appellate courts have a measure of discretion to identify the issues presented for resolution, that discretion does not usually include adjudicating the constitutionality of a statute that the government has declined to invoke on appeal. Nevertheless, the issue whether that discretion was properly exercised in this case does not independently merit review. Nor is review warranted of the case-specific question whether, if Section 3501 was properly before the court of appeals, its applicability to this case should have been reviewed under the plain error standard.

3. Petitioner also seeks review of the court of appeals' holding that the Fourth Amendment does not require suppression of the physical evidence obtained during execution of the search warrant at petitioner's apartment. Pet. 18-22. All three panel members correctly concluded that the physical evidence should not be suppressed, and no broad legal issue is presented.

The Particularity Clause of the Fourth Amendment seeks to prevent "a general, exploratory rummaging in a person's belongings," by requiring that warrants particularly describe the

---

[24](...continued)
we also note (as we did in our brief in support of partial rehearing en banc at 13 n.5) that, if the court of appeals had ordered the district court to consider the evidence presented by the government on motion for reconsideration, it might have avoided an unnecessary decision of a constitutional question, see Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). If the Court grants certiorari, the issue of whether the court of appeals should have remanded for further factfinding to determine if petitioner in fact received Miranda warnings before making his statements would be fairly included in the question presented.

items to be seized. See Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The courts of appeals generally agree that "[t]he test for the necessary particularity is a pragmatic one." United States v. Torch, 609 F.2d 1088, 1090 (4th Cir. 1979) (internal quotation marks omitted), cert. denied, 446 U.S. 957 (1980).[25]

The court correctly upheld the search warrant in this case. The warrant's description of "evidence of the crime of bank robbery" was adequate because bank robbery is a specific and relatively narrow crime that "tends to generate quite distinctive evidence, e.g., guns, masks, bait money, dye-stained bills and clothes, carrying bags." Pet. App. 18a. Such evidence is readily recognizable to trained officers and the warrant thus sufficiently "confine[d] the executing officers' discretion." United States v. Fawole, 785 F.2d 1141, 1144 (4th Cir. 1986). The courts of appeals have repeatedly upheld comparable warrants. See, e.g., United States v. George, 975 F.2d 72, 76 (2d Cir. 1992) ("a specific illegal activity") (citing cases); United States v. Ladd, 704 F.2d 134, 136 (4th Cir. 1983) ("the smuggling, packing, distribution and use of controlled substances").[26]

---

[25] See also, e.g., United States v. Moody, 977 F.2d 1425, 1432 (11th Cir. 1992), cert. denied, 507 U.S. 1052 (1993); In re Search of Kitty's East, 905 F.2d 1367, 1374 (10th Cir. 1990); United States v. Shoffner, 826 F.2d 619, 631 (7th Cir.), cert. denied, 484 U.S. 958 (1987); United States v. Davis, 542 F.2d 743, 745 (8th Cir.), cert. denied, 429 U.S. 1004 (1976).

[26] There is no merit to petitioner's reliance (Pet. 18-19) on United States v. Robertson, 21 F.3d 1030 (10th Cir.), cert. denied, 513 U.S. 891 (1994), and United States v. Buck, 813 F.2d 588 (2d Cir.), cert. denied, 484 U.S. 857 (1987). In Robertson, the court upheld a warrant that authorized a search for four specified items
(continued...)

In any event, the court of appeals also correctly determined that the officers relied in good faith on the warrant. See United States v. Leon, 468 U.S. 897, 922 (1984). The warrant provided the officers with some guidance as to the items to be seized, and the lead agent in the case "was familiar not only with the specifics of the bank robbery in question," but also "with the type of evidence to look for." Pet. App. 19a. The court of appeals' unanimous conclusion on that point is consistent with the decisions of the other courts of appeals.[27] Further review of the search warrant issue is not warranted.[28]

CONCLUSION

The petition for a writ of certiorari should be granted as to the admissibility of petitioner's statements and denied as to the admissibility of the items seized in the warrant-authorized search.

Respectfully submitted.

JANET RENO
Attorney General

---

[26](...continued)
and "other instrumentalities and fruits of the crime of armed carjacking." 21 F.3d at 1032, 1033-1034. In Buck, the warrant did not even specify the particular crime or crimes under investigation, instead referring generally to the criminal incident orally described by the police officer. Moreover, Buck reversed the district court's order of suppression, finding (as did the court of appeals in this case) that the officers reasonably relied in good faith on the warrant. See Buck, 813 F.2d at 592-593.

[27] See, e.g., Robertson, 21 F.3d at 1034; Buck, 813 F.2d at 592-593.

[28] Although petitioner claims (Pet. 20-21) that Agent Lawlor misled the magistrate judge who issued the search warrant, that factbound assertion was unanimously rejected by the court of appeals. Pet. App. 20a n.6.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
LISA S. BLATT
Assistants to the Solicitor General

NOVEMBER 1999

APPENDIX

Section 3501 of Title 18 provides as follows:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time o making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the abovementioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other official empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other

detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other official beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
SUPREME COURT, U.S.
POLICE DEPARTMENT

NOV 01 1999

A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

1939
MF

NO. 99-5525

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, by First Class Mail, postage prepaid, on this 1st day of November, 1999.

James W. Hundley
The Mosby Professional Bldg.
10560 Main Street
Suite 314
Fairfax, VA 22030

Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036

RECEIVED
AFTER HOURS
NOV - 2 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Seth P. Waxman/cs

SETH P. WAXMAN
Solicitor General
Counsel of Record

November 1, 1999

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
NOV 1 - 1999
OFFICE OF THE CLERK

No. 99-5525

In the Supreme Court of the United States

CHARLES T. DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN PARTIAL SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts, Ave., NW
Washington, DC 20036
(202) 588-0302

Paul G. Cassell
(*Counsel of Record*)
University of Utah
College of Law
332 S. 1400 E. Front
Salt Lake City, UT 84112
(801) 585-5202

Counsel for Amicus Curiae

November 1, 1999

25PP

TABLE OF CONTENTS

Page

Interests of Amicus Curiae 1

Statement of the Case 3

Reasons for Granting the Petition 3

Whether 18 U.S.C. § 3501 or *Miranda*'s Exclusionary Rule Governs the Admissibility of Confessions Is an Important Question of Federal Law That Should Be Decided by this Court 3

Conclusion 19

Appendix A

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Agents,
403 U.S. 388 (1971) 9, 10, 14
Bousley v. United States,
523 U.S. 614 (1998) 18
Bush v. Lucas,
462 U.S. 367 (1983) 10, 15
City of Boerne v. Flores,
521 U.S. 507 (1997) 6
Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) 3
Coleman v. Thompson,
501 U.S. 722 (1991) 15
Colorado v. Spring,
479 U.S. 564 (1987) 12

Davis v. United States,
512 U.S. 452 (1994) . . . . . *passim*
Edwards v. Arizona,
451 U.S. 47[illegible] (1981) 5
Harris v. New [illegible]ork,
401 U.S. 222 (1971) 7, 8, 9
Bob Jones University v. United States,
456 U.S. 922 (1982) 18
INS v. Lopez-Mendoza,
468 U.S. 1032 (1984) 14
Mapp v. Ohio,
367 U.S. 643 (1961) 9
Michigan v. Tucker,
417 U.S. 433 (1974) 7
Mincey v. Arizona,
437 U.S. 385 (1978) 9
Miranda v. Arizona,
384 U.S. 436 (1966) . . . . . *passim*
Moran v. Burbine,
475 U.S. 412 (1986) 12
New Jersey v. Portash,
440 U.S. 450 (1979) 8-9
New York v. Quarles,
467 U.S. 649 (1984) 7, 9
Oregon v. Elstad,
470 U.S. 298 (1985) 6, 7
Oregon v. Hass,
420 U.S. 714 (1975) 8, 9
Palermo v. United States,
360 U.S. 343 (1959) 6, 10
Schweiker v. Chilicky,
487 U.S. 412 (1988) 10
Singleton v. Wulff,
428 U.S. 106 (1976) 2

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 17
United States v. Alvarez-Sanchez,
511 U.S. 350 (1994) 4
United States v. Cheely,
21 F.3d 914 (9th Cir. 1994) 5
United States v. Crocker,
510 F.2d 1129 (1975) 5
United States v. Dickerson,
166 F.3d 667 (4th Cir. 1999) 1, 2, 13, 17
United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.,508 U.S. 439 (1993) . . 2
United States v. Rivas-Lopez,
988 F. Supp. 1424 (D. Utah 1997) 4
United States v. Tapia-Mendoz,
41 F. Supp.2d 1250 (D. Utah 1999) 5
Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 3
Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 16
Withrow v. Williams,
507 U.S. 689 (1993) 7
Young v. United States,
315 U.S. 257 (1942) 2

Statutes and Constitutional Provisions:

U.S. Const. Amend. V . . . . . *passim*
18 U.S.C. § 241 14
18 U.S.C. § 242 14
18 U.S.C. § 3501 . . . . . *passim*
18 U.S.C. § 3501(b)(2) 12
Federal Tort Claims Act, 28 U.S.C. § 2680(h) . . 14

Legislative Material:

S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. at 2132 . . . 16

Miscellaneous:

Fed. R. Crim. P. 52. 2
Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) 17
Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1994) . . . 17
Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) 16
Fred Graham, THE SELF-INFLICTED WOUND (1970) 11
Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) 9

INTERESTS OF AMICUS CURIAE[1]

The Washington Legal Foundation (WLF) is a national, nonprofit public interest law and policy center, with supporters in all fifty states. WLF participates in litigation and administrative proceedings affecting the broad public interest, including criminal justice reform and the rights of crime victims. With the consent of both parties, WLF participated as an amicus in the court of appeals in this case both by filing a brief and presenting oral argument. The Fourth Circuit adopted WLF's arguments on the applicability of 18 U.S.C. § 3501 as the basis for of its holding. *See United States v. Dickerson*, 166 F.3d 667, 680 & n.14 (4th Cir. 1999) (noting WLF's briefing and participation in oral argument). WLF has also pressed Section 3501 before this Court. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (noting WLF's briefing raising Section 3501).

WLF urges the Court to grant certiorari only on the first question by petitioner Dickerson: whether 18 U.S.C. § 3501 is the governing law on the admissibility of confessions in federal court. WLF believes the court of appeals correctly ruled that the admissibility of Dickerson's confession was governed by Section 3501. Nonetheless, the court's decision that Section 3501, rather than *Miranda*'s exclusionary rule, is the governing law on that

---

[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party in this case authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. Written consents for the filing of this brief by the parties have been lodged with the Clerk.

issue presents an important question of federal law that should be resolved by this Court.[2]

---

[2] Dickerson also asks this Court to grant the writ to review whether the court of appeals erred in applying Section 3501 because, Dickerson argues, it was barred from doing so under Fed. R. Crim. P. 52 (permitting appellate review of an issue not presented to the district court only for plain error). Cert. Pet. at 15. This Court should not grant certiorari on this subsidiary question. In the first place, the case in fact presents no Rule 52 issue, because the government did raise Section 3501 in the district court in its Motion for Reconsideration. *See Dickerson*, 166 F.3d at 680. It later abandoned the argument in the court of appeals, but at that juncture Rule 52's "plain error" standard, designed to prevent reversals on grounds not initially raised in the district court, no longer had any bearing on the court of appeals' authority to reach the Section 3501 question.

Moreover, the United States did appeal the district court's ruling on the admissibility of the confession. At that point, the Fourth Circuit's decision that it should determine what law governed that question before deciding it, was surely, at a minimum, permissible. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals"). The Fourth Circuit's decision to reach the issue is, indeed, squarely supported by this Court's conclusion in *United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993), that the court below had properly considered the question whether a statute had been repealed even though neither party had argued it, since the parties could not prevent the court from deciding the case under the truly governing law simply by stipulating to a different law. *Cf. Young v. United States*, 315 U.S. 257, 259 (1942) ("the proper administration of the criminal law cannot be left merely to the stipulation of parties").

Finally, the question of the status of Section 3501 is undoubtedly properly before *this* Court. "It suffices for [this Court's] purposes that the court below passed on the issue presented, particularly where the issue is * * * in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal citations omitted); *accord Cohen v. Cowles Media Co.*, 501 U.S. 663, 667- 668 (1991). The status of Section 3501 presents a purely legal issue, and the record in this case contains all the information necessary for this Court to render judgment. *Cf. Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) ("As far as I am concerned, such a time [for reaching the merits of Section 3501] will have arrived when a case that comes within the terms of this statute is next presented to us."). Given the importance and complexity of this principal question, it is well worth avoiding secondary questions in the briefing and argument.

STATEMENT OF THE CASE

The facts of the case are fully recounted in the opinion below, *see United States v. Dickerson*, 166 F.3d 667, 674-77 (4th Cir. 1999), upon which WLF relies.

REASONS FOR GRANTING THE PETITION

WHETHER 18 U.S.C. § 3501 OR *MIRANDA*'S EXCLUSIONARY RULE GOVERNS THE ADMISSIBILITY OF CONFESSIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

The Court should grant the petition with respect to 18 U.S.C. § 3501 to end the present uncertainty about whether Section 3501 governs the admissibility of custodial confessions in federal court — as the Court has twice

stated, *see Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (*quoting United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994)) — or whether the automatic exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), does so. Acting in the absence of legislation, the Court promulgated *Miranda*'s sweeping exclusionary rule as a prophylactic measure extending beyond the requirements of the Constitution to reduce the risk of potential Fifth Amendment violations. This extraconstitutional rule of exclusion continues to control in most federal courts in the teeth of a later Act of Congress requiring a more refined approach. Whether Section 3501 or *Miranda*'s exclusionary rule provides the standard for the admissibility of confessions is a question of federal law on which the courts of appeals have adopted conflicting approaches and one that has not been, but should be, settled by this Court.

The Court should also grant review because it is the proper authority to clarify the basis for the exclusionary rule devised by the *Miranda* Court, and the related question whether Congress properly may modify that rule. In particular, this Court should clarify the relationship between its own authority to devise remedies that assist in protecting (but are not required to protect) a Constitutional right, and Congress's authority to modify those remedies in a way that fully protects the underlying right while reducing the serious social costs imposed by the judicially-devised regime sweeping more broadly than the Constitution requires.

1. The court of appeals upheld Section 3501 against a constitutional challenge, ruling that Section 3501, rather than *Miranda*'s exclusionary rule, is the law governing the admission of custodial confessions into evidence at federal criminal trials. In two recent cases, *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997); *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1256 (D. Utah 1999), the U.S. District Court for Utah agreed, relying in part on the decision of the Tenth Circuit to the same effect. *See United States v. Crocker*, 510 F.2d 1129, 1136-38 (10th Cir. 1975) (alternative holding). But the Act of Congress continues to be all but ignored in the other circuits, which routinely decide the admissibility of custodial confessions under *Miranda*'s exclusionary rule without any reference to Section 3501's superseding standard.[3]

Moreover, if Section 3501 is in fact the governing law, the lower courts' failure to follow it rather than *Miranda*'s exclusionary rule has real and serious consequences. It "has caused the federal judiciary to confront a host of '*Miranda*' issues that might be entirely irrelevant under federal law * * *. Worse still, it may have produced * * * the acquittal and the non-prosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." *Davis v. United States*, 512 U.S. 452, 465-66 (1994) (Scalia, J., concurring). A decision by this Court is warranted in order to resolve this matter of recurring and first-rank importance.

2. The question whether *Miranda*'s exclusionary rule or Section 3501 governs the admissibility of confessions

---

[3] The Ninth Circuit's two-sentence conclusion in *United States v. Cheely*, 21 F.3d 914, 923 (9th Cir. 1994) that Section 3501 does not "trump" *Edwards v. Arizona*, 451 U.S. 477 (1981) is the closest any other court of appeals has come to acknowledging any possible effect of Section 3501 on *Miranda*'s exclusionary rule.

turns on whether *Miranda*'s exclusionary rule is constitutionally required. If it is, then plainly Congress cannot change it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). If it is not — if instead it is, as the Court often has stated, a judicially-devised remedy that "serves" the Fifth Amendment but "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) — then it is equally plain that Congress does have the power to modify it, *see Palermo v. United States*, 360 U.S. 343 (1959), at least so long as the remedial regime that Congress substitutes continues fully to honor what the Constitution requires.

The court below determined that *Miranda*'s exclusionary rule is not constitutionally required, and that Section 3501 is such a permissible modification. In WLF's view, both conclusions are correct. Both, however, are issues that only this Court is capable of resolving authoritatively.

a. That *Miranda*'s exclusionary rule is not constitutionally required is both the better reading of the *Miranda* opinion and the only view of it consistent with the rest of this Court's and the lower federal courts' law on custodial confessions. The *Miranda* Court itself stated that it had no intention of "creat[ing] a constitutional straitjacket which will handicap sound efforts" in Congress and among the States to devise their own measures against compelled self-incrimination, "while promoting efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467. These statements are impossible to explain if the Court believed the specific rules it announced were ordained by the Constitution.

To the extent *Miranda* is ambiguous on the question, however, the Court's later cases establish that the Constitution requires neither the *Miranda* warnings, nor the rule established there that unwarned confessions must be excluded even when they are voluntary. Rather, *Miranda*'s rules are "prophylactic," put forth as "a series of recommended procedural safeguards," *Davis v. United States*, 512 U.S. at 457-458, that are "not themselves protected by the Constitution" and are "not constitutional in character," *Withrow v. Williams*, 507 U.S. 689, 690-691 (1993). The Court has also stated pointedly that *Miranda*'s exclusionary rule "sweeps more broadly than the Fifth Amendment" and that its "preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Elstad*, 470 U.S. at 306-07.

Moreover, the Court has relied on the non-constitutional status of *Miranda*'s exclusionary rule in various contexts in refusing to suppress unwarned or imperfectly warned custodial confessions and their fruits.[4] Most important in this regard are a trio of cases in which the Court made an exception to *Miranda*'s exclusionary rule and allowed the admission into evidence of un-Mirandized but voluntary confessions. In *New York v. Quarles*, 467 U.S. 649, 654 (1984), the Court ruled that an incriminating statement obtained as a result of a police question, "Where's the gun?," asked of a rape suspect they

---

[4] *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Oregon v. Hass*, 420 U.S. 714, 720-24(1975); *Michigan v. Tucker*, 417 U.S. 433, 444-52 (1974); *Harris v. New York*, 401 U.S. 222, 223-25 (1971).

had just captured, was admissible despite the failure to give *Miranda* warnings. Similarly, in *Harris v. New York*, 401 U.S. 222, 224 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Court held that confessions obtained in violation of *Miranda* could be used to impeach the testimony of a defendant who took the stand at his trial.

The basis the Court gave for these rulings was that *Miranda*'s exclusionary rule is not constitutionally required. The Court was therefore free to allow other policy considerations to take precedence over that rule, which rested merely on *Miranda*'s policy decision to bolster the Fifth Amendment's right against self-incrimination with an additional layer of prophylactic protection. *See Quarles*, 467 U.S. at 657 n.7 ("absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of evidence that results from police inquiry of this kind * * * "); *Hass*, 420 U.S. at 721-24; *Harris*, 401 U.S. at 224-26.

The competing theory of *Miranda*'s exclusionary rule — that un-Mirandized confessions are excluded because the failure to give the suspect his warnings means his confession is necessarily "compelled" as that term is used in the Fifth Amendment — cannot possibly be squared with these decisions. Under that reading, *any* use of an un-Mirandized confession at trial, including the ones allowed in *Quarles*, *Harris*, and *Hass*, would also have to be barred, since those uses too would amount to "compelled" self-incriminating testimony. And, indeed, the Court has concluded that the Fifth and Fourteenth Amendments do require the exclusion of involuntary confessions even for impeachment purposes, distinguishing *Harris* and *Hass* as involving confessions obtained as a result of mere *Miranda*, rather than constitutional, violations. *See New Jersey v.*

Portash, 440 U.S. 450, 458-59 (1979); *Mincey v. Arizona*, 437 U.S. 385, 397 (1978). Accordingly, the Court's admission of un-Mirandized statements in *Quarles*, *Harris*, and *Hass* proves that *Miranda*'s rule excluding unwarned but voluntary confessions is *not* required by the Constitution. That is the starting point from which to analyze Congress's authority to adopt Section 3501.

b. *Miranda*'s exclusionary rule is best understood not as a constitutional command, but as an exercise of this Court's authority to improvise a remedy when it is presented with an issue implicating a constitutional right for which there is not at the time of the decision a constitutionally or legislatively specified remedy. *See Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961). The judicially devised remedy may sweep more broadly than is strictly necessary to vindicate a particular constitutional right. *Bivens*, 403 U.S. at 397; *cf. id.* at 406-08 (Harlan, J., concurring). This devising of interstitial remedies not themselves required by the Constitution, but designed to assist in protecting constitutional rights, has become known as the Court's power to create "constitutional common law." *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Because the Court has crafted such remedies to protect constitutional rights against the States as well as against the federal government, *see, e.g., Mapp*, 367 U.S. 643, this understanding of *Miranda*'s exclusionary rule is entirely consistent with its application to the States.

c. If, as the Court's cases establish, *Miranda*'s exclusionary rule was not constitutionally compelled but was instead an exercise of the Court's power to improvise a prophylactic measure to assist in protecting a

Constitutional right, it follows that Congress has power to modify the Court's remedial scheme. *Cf. Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). The existence of such a residual power in Congress is, for example, presumed throughout *Bivens*, 403 U.S. at 397; *id.* at 406-08 (Harlan, J., concurring), and lies at the heart of this Court's later holding in *Bush v. Lucas*, 462 U.S. 367 (1983). In that case, the Court refused to allow a "*Bivens*" remedy for money damages in an action brought by a federal employee alleging a breach of his First Amendment rights, because Congress, by statute, had provided for a different remedy. *Id.* at 377. Moreover, whatever the outer constitutional limits of Congress's power may be in this context, it is plain that Congress acts within them so long as the remedial scheme it establishes provides "meaningful" relief for any actual constitutional violation. *See Lucas*, 462 U.S. at 386; *id.* at 372; *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

d. Replacing *Miranda*'s automatic exclusionary rule with Section 3501's regime was a proper exercise of such Congressional authority. Under Section 3501, compelled custodial statements remain inadmissible in all circumstances. Hence, Section 3501 leaves intact the core holding of *Miranda*: that the prohibition against compelled self-incrimination extends beyond in-court statements to regulate any use at trial of a defendant's pre-trial custodial statements. Indeed, the relief the statute affords for an *actual constitutional violation* involving such statements is *identical* to the relief afforded by *Miranda*. That is sufficient *per se* to establish the statute's propriety.

But there is more. Section 3501 also preserves much of the prophylactic value of *Miranda*'s exclusionary rule, albeit through a slightly different and more refined

mechanism. As the Court below noted, Section 3501 continues to provide a strong incentive for police to advise suspects of their "Miranda rights." *See Dickerson*, 166 F.3d at 692. The statute does this by making use of the police's eventual need to secure a favorable judicial decision on admissibility concerning the fruits of their questioning — the same instrument the *Miranda* Court used — to create that incentive at the police station.

Section 3501's approach differs from *Miranda*'s on only one point. Instead of requiring automatic exclusion of a confession not preceded by warnings, Section 3501 provides that the district court is to make the admissibility determination by deciding whether the confession was, in fact, voluntary. In making this determination, the court is required by the statute to consider, not as the sole factor but as a prominent one, whether the warnings were given.

Thus, Section 3501 is not only fully adequate to vindicate the actual constitutional right against compelled self-incrimination -- compelled statements remaining banned in all circumstances -- but, through its framework for determining voluntariness, preserves a significant portion of *Miranda*'s prophylactic protections for suspects in custody. In so doing, the statute does not simply restore the legal status quo ante but goes significantly beyond pre-*Miranda* voluntariness law. *See* FRED GRAHAM, THE SELF-INFLICTED WOUND 324 (1970) ("parts of [Section 3501] would have been a progressive expansion of suspect's rights if Congress had passed it prior to *Miranda*"). Indeed, one of the Section 3501 factors goes beyond not only pre-*Miranda* case law, but beyond current *Miranda* and Fifth Amendment doctrines. The statute directs the district court to consider whether the "defendant knew the nature of the offense with which he was charged or of

which he was suspected at the time of the confession." 18 U.S.C. § 3501(b)(2). This requirement extends further than existing *Miranda* and Fifth Amendment case law, which makes clear that such inquiry by the trial court is *not* routinely required in order to assess the voluntariness of a suspect's confession. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987) (suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege).

The unmistakable prominence that *Miranda* warnings enjoy in Section 3501 means that, if this Court were to uphold the statute, federal law enforcement officers would almost certainly continue to give them. That, indeed, is what amicus understands has been happening in the five States that comprise the Fourth Circuit since the *Dickerson* ruling earlier this year. Thus, the lower court's opinion has produced an enviable "win-win" situation in that (1) federal law enforcement officers continue to deliver the *Miranda* warnings, while (2) in cases with technical disputes over *Miranda* compliance (this case being a prime example, *see* 166 F.3d at 673-77) the statement will be admitted — so long as it was voluntary — but excluded if it was not.[5]

---

[5] If, contrary to our view, the Court believes the effectiveness of Section 3501's extraconstitutional deterrent is important, it may wish *not* to grant certiorari in this case. Allowing the Section 3501 regime to operate for several years in the Fourth Circuit would permit the Court to make an informed judgment on that question. This Court has repeatedly emphasized that the *Miranda* rules rest on cost-benefit calculations. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986). Yet those calculations have not had the benefit of empirical study. *Cf. Miranda*, 384 U.S. at 524 (Harlan, J., dissenting) (urging legislative solutions to regulating police interrogation that would "have the vast advantage of empirical data and comprehensive study . . . [and] would allow experimentation and use of solutions not open to the courts"). Leaving the Fourth Circuit's ruling undisturbed would allow development of a firm, empirical basis for determining the costs and benefits of differing approaches to the issue.

e. The foregoing demonstrates that even without considering other features of post-*Miranda* federal law, Section 3501's rule of case-by-case admissibility determinations is a *constitutionally* sufficient alternative to *Miranda*'s rigid rule — a rule barring the use of every unwarned confession regardless of how minor or innocent the police error was, or how close a question it is whether there was an error, or, most importantly, regardless of how powerful the evidence is that, despite any error, the defendant's statement was in fact voluntary and admissible under the *Constitution*'s standards.

Were there any doubt on the matter, however, the statute's constitutionality is even clearer when Section 3501 is considered against the backdrop of all federal law bearing on the issue of questioning by federal agents. The interrogation practices of federal law enforcement officers are addressed not solely in Section 3501, but also by other federal statutes and related bodies of law that provide the possibility of criminal, civil, and administrative penalties against officers who coerce suspects. Almost all of this law was created or significantly expanded after *Miranda*, and has made the legal incentives for non-coercive police questioning almost unrecognizably greater than when *Miranda* was decided.

For example, officers who forcibly extract confessions are now subject to criminal sanctions under 18 U.S.C. §§ 241, 242 (provisions which were originally adopted during Reconstruction, but vastly expanded since *Miranda* through judicial interpretation); civil actions under *Bivens* (decided in 1971); and administrative remedies (internal disciplinary rules of various agencies). Furthermore, the officers' employing federal agencies are subject to civil actions under the Federal Tort Claims Act (28 U.S.C. § 2680(h)) (amended in 1974 to cover relevant acts or omissions of federal law enforcement officers). At the same time, the legal landscape today — if Section 3501 is implemented — allows voluntary confessions to be used in evidence (18 U.S.C. § 3501).

This is an entirely reasonable and, in many ways, a more effective approach to securing respect for the values of the Fifth Amendment than *Miranda's* extraconstitutional exclusionary rule. Unlike *Miranda*, the criminal and civil sanctions adopted by Congress and the *Bivens* actions recognized by the Court focus on conduct squarely implicating the Fifth Amendment proscription against "compelled" self-incrimination. At the same time, they provide stronger remedies against federal agents who coerce confessions than does the *Miranda* exclusionary rule. The exclusion of evidence "does not apply any direct sanction to the individual official whose illegal conduct" is at issue. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Civil suits and internal disciplinary actions constitute "sensible and reasonable steps to deter [Fifth] Amendment violations by [federal] officers, and this make the likely additional deterrent value of [the *Miranda*] exclusionary rule small." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Similarly, the FTCA remedy provides a strong incentive

for federal agencies to make sure that their agents hew to Fifth Amendment lines. As a result, the remedial regime that exists now, 33 years after *Miranda* -- including Section 3501 -- is fully consistent with *Miranda*'s statement that "[w]e encourage Congress . . . to continue [its] laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." 368 U.S. at 467. *Cf. Bush v. Lucas*, 462 U.S. 367, 388-90 (declining to create judicial remedy because of congressional action).

f. Finally, given the substantial change in the legal and remedial landscape, and the equally substantial improvement in police professionalism, it is significantly less likely now than it was when *Miranda* was decided that unwarned custodial questioning will produce a "compelled" statement. Moreover, there are probably few people in the country today who are unaware of the rights the *Miranda* Court thought they needed to be told about before police questioning. For the courts to continue in every case to apply an irrebuttable presumption assuming compulsion as a matter of fact, when the actual facts are extremely unlikely to mirror the presumed ones most of the time, seems difficult to justify. *See Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("Per se rules should not be applied * * * in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time."). Thus, putting entirely to one side the question whether judicially improvised rules that extend beyond constitutional requirements can continue in the face of a contrary Congressional judgment, the *Miranda* Court's 1966 view about the need for a sweeping exclusionary rule has simply become an anachronism.

3. A final reason for granting certiorari is the need to consider the interests of those who are too often "unnamed and unrepresented" in criminal cases: victims of crime. *See Miranda*, 384 U.S. at 543 (White, J., dissenting). The federal courts' failure to implement Section 3501 "may have produced * * * the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." *Davis v. United States*, 512 U.S. at 465-66 (Scalia, J., concurring). Similar concerns certainly animated the congressional decision to adopt Section 3501. After extensive hearings on *Miranda*'s real world effects, the Senate Judiciary Committee recommended adoption of Section 3501 because "the rigid and inflexible requirements of the majority opinion in the *Miranda* case are * * * extremely harmful to law enforcement." S. REP. NO. 1097, 90th Cong., 2d Sess. at 46, *reprinted in* 1968 U.S.C.C.A.N. at 2132. Congress' finding on this "essentially factual issue" are "of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

More recent empirical scholarship also supports the congressional conclusion, despite what had long been the conventional academic wisdom that *Miranda* had done little to harm law enforcement. An econometric analysis of the precipitous drop in clearance rates (the rates at which police officers solve or "clear" crimes) immediately following *Miranda* found that tens of thousands of crimes go unsolved each year as a result of the decision. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on*

Law Enforcement, 50 STAN. L REV. 1055 (1998).[6] Similarly, the "before-and-after" *Miranda* data on confession rates strongly suggest the *Miranda* rules have deterred many dangerous criminals from confessing. Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996); *see also* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871-76 (1994) (similar findings). Like the congressional hearings, these studies consider harms beyond the ken of the judiciary; they review data on "lost" criminal cases from *Miranda* — that is, those that can never be prosecuted and thus never reach the courts.

These real world effects lend urgency to reviewing the decision below. For if Congress's factual finding is correct — as this Court must assume, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion) — many dangerous criminals are escaping justice in the teeth of a federal statute that would permit their successful prosecution. *See, e.g., Dickerson*, 166 F.3d at 672.

The Constitution does not require the country to pay this price. It requires the exclusion of compelled confessions, as the law of any civilized nation would exclude them. But it does not require the exclusion of a wrongdoer's voluntary confession -- the most reliable and important evidence available to the criminal justice system. For the judicial branch to reject that evidence when the Constitution demands no such thing was, in the absence of

---

[6] The FBI data on which this analysis rests are plotted in Appendix A to this brief.

legislation, an arguably permissible but certainly questionable policy choice from the outset. For it to persist in that rejection in the face of a Congressional directive that voluntary confessions are to be admitted is to maintain that questionable choice after the opportunity for *any* choosing has been closed. By granting review in this case and holding that Section 3501 rather than *Miranda*'s exclusionary rule governs decisions concerning the admission of voluntary confessions, this Court can return the choice to where it belongs: the elected branches. [7]

---

[7] WLF also notes that the Department of Justice initially asserted the applicability of Section 3501 in this case in the district court. However, the Department abandoned that argument in the Fourth Circuit, and later joined defendant Dickerson in unsuccessfully urging rehearing en banc of the panel opinion on the ground that the court of appeals could not apply the statute because of its alleged constitutional infirmity. If the Department of Justice continues to adhere to this position — an open question, in light of its statements to the court of appeals and to Congress that it might well take a different view on the question whether *this* Court should apply Section 3501 — or decides not to defend the Fourth Circuit's judgment on the ground that court relied on, this Court would be left without an advocate for the opinion below should it grant the petition. Should that be the case, WLF is willing and prepared to serve as Court-appointed amicus to defend the Fourth Circuit's opinion, if the Court so desires. *See, e.g., Bousley v. United States*, 523 U.S. 614, ___, 118 S.Ct. 1604, 1609 (1998) (appointing *amicus* to brief and argue in support of decision below where the United States disagreed with the court of appeals' analysis); *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982) (inviting an *amicus* to file a brief and argue "in support of the judgments below" where the United States was not prepared to do so).

CONCLUSION

The Court should grant the writ on the issue of the applicability of 18 U.S.C. § 3501 to motions to suppress voluntary confessions in federal court.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Paul G. Cassell
(*Counsel of Record*)
University of Utah College of Law
332 S. 1400 E. Front
Salt Lake City, UT 84112
(801) 585-5202*

Counsel for Amicus Curiae
Washington Legal Foundation

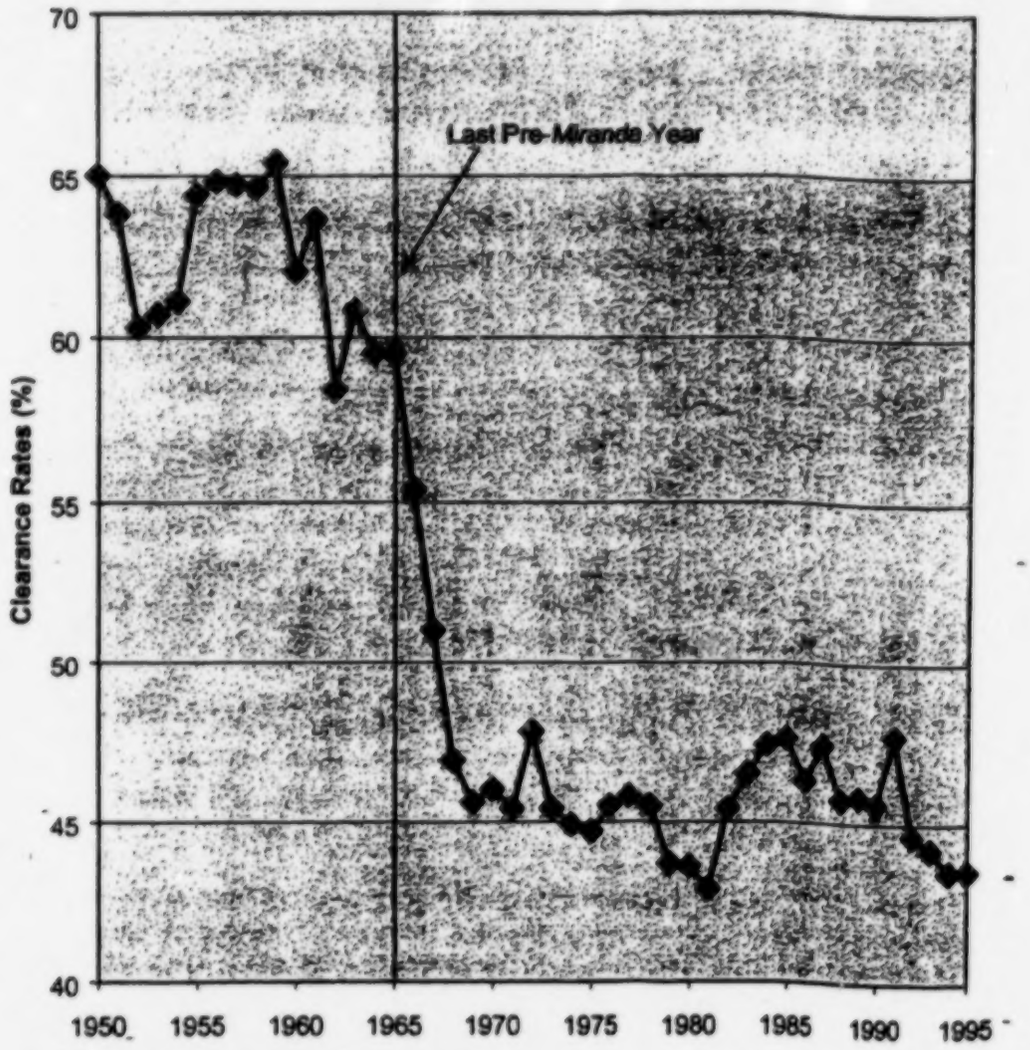
November 1, 1999

---

* This business address is not intended to imply institutional endorsement.

Appendix A

Figure 1 - Violent Crime Clearance Rates from 1950 to 1995



This chart, which depicts the Violent Crime Clearance Rates from 1950 to 1995, is reproduced in Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1069 (1998), and is based on information gathered from the *Federal Bureau of Investigation, Uniform Crime Reports* published over the various years.

(5)

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX
Volume I

JAMES W. HUNDLEY *
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, VA 22030
(703) 385-8005

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

JANET RENO
Attorney General
SETH P. WAXMAN *
Solicitor General
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondent

January 28, 2000

* Counsel of Record

PETITION FOR CERTIORARI FILED JULY 30, 1999
CERTIORARI GRANTED DECEMBER 6, 1999

TABLE OF CONTENTS

Volume I

	Page
Criminal Docket Entries	1
Court of Appeals Docket Entries	15
Advice of Rights Form dated January 27, 1997	21
FBI Form 302: Report by Special Agent Christopher Lawlor re: statement of Charles Dickerson (Jan. 29, 1997)	22
Superseding Indictment	27
Transcript of Suppression Hearing before U. S. District Court (May 30, 1997) (excerpt)	35
Defendant's Motion to Suppress and Motion to Reconsider and Memorandums in Support (July 11, 1997)	75
Government's Motion for Reconsideration (July 15, 1997) with supporting exhibits:	86
a. Affidavit of Thomas Durkin dated July 10, 1997 with attached exhibit (handwritten note of Charles Dickerson)	101
b. Affidavit of FBI Agent Lawrence Wenko dated July 8, 1997 (with attachment)	107
Defendant's Opposition to Government's Motion for Reconsideration (July 28, 1997)	117
Transcript of Hearing before U. S. District Court (August 1, 1997)	127
Government's Notice of Appeal and Certification (September 2, 1997)	137

TABLE OF CONTENTS—Continued

Volume II

	Page
District Court Order & Memorandum Granting in part and Denying in part Defendant's Motion to Suppress (July 1, 1997)	139
District Court Order & Memorandum Denying Government's and Defendant's Motion for Reconsideration (Aug. 4, 1997)	156
Circuit Court Opinion (Feb. 8, 1999)	162
Circuit Court Order Denying Appellee's Petition for Rehearing and Rehearing *en banc* (Apr. 1, 1999)	226
Circuit Court Order Granting Appellee's Motion To Recall and Stay the Mandate (Apr. 14, 1999)	227

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA)

Criminal Docket No. 97-CR-159-ALL

UNITED STATES OF AMERICA,
Plaintiff,

v.

CHARLES THOMAS DICKERSON,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
1/28/97	1	COMPLAINT as to Charles Thomas Dickerson [1:97-m-83] (rtra) [Entry date 01/28/97]
1/28/97	2	AFFIDAVIT by USA as to Charles Thomas Dickerson Re:[1-1] complaint [1:97-m-83] (rtra) [Entry date 01/28/97]
1/28/97	—	CJA 23 FINANCIAL AFFIDAVIT by Charles Thomas Dickerson [1:97-m-83] (rtra) [Entry date 01/28/97]
1/28/97	—	CJA 20 as to Charles Thomas Dickerson: Appointment of Attorney Joseph John McCarthy Voucher # 0749883 (Approved by Magistrate Judge W. Curtis Sewell) [1:97-m-83] (rtra) [Entry date 01/28/97]
1/28/97	—	Initial appearance as to Charles Thomas Dickerson held; Preliminary Examination/Detention Hearing set for 10:00 1/30/97 for Charles Thomas Dickerson before Magistrate

DATE	NO.	PROCEEDINGS
		Judge W. C. Sewell (Tape 30.) USA appeared through: K. Kahoe. Dft(s) appeared through: w/o counsel. (Defendant informed of rights.) Court to appt counsel. US motions for detention-granted. Deft. is remanded to the custody of the USMS. [1:97-m-83] (ntho) [Entry date 01/29/97] [Edit date 01/29/97]
1/28/97	3	ORDER OF TEMPORARY DETENTION as to Charles Thomas Dickerson (Signed by Magistrate Judge W. C. Sewell). Copies sent. [1:97-m- 83] (ntho) [Entry date 01/29/97]
1/30/97	—	Preliminary Examination/Detention Hearing as to Charles Thomas Dickerson held before Magistrate Judge W. C. Sewell (Tape 46.) USA appeared through: R. Spencer. Dft(s) appeared through: w/counsel; J. McCarthy. US adduced evidence—agent adopts the affidavit as his testimony. Deft. cross examines the witness. US rests. Court finds PC. US has no additional evidence as to the issue of detention. Deft. motions for bond w/electronic monitoring. PR bond is set w/the following conditions; maintain-seek employment, may not depart the Wash. metro area w/o prior approval, risede [sic] w/Kathy Derrington—3rd party custodian. avoid contact w/ James Rodchester, or any person identified by the US as a witness or deft. except in the presence of an atty. Report to pts, comply w/ curfews imposed by PTS, refrain from possessing a fire arm, refrain from excessive use of alcohol, and any use or unlawful poss. of a narcotic drug, undergo substance abuse testing/treatment as directed by PTS, electronic monitoring. ORDER IS STAYED UNTIL 5:00 PM, JANUARY 31, 1997. [1:97-m-83] (ntho) [Entry date 01/30/97]

DATE	NO.	PROCEEDINGS
1/30/97	4	ORDER Setting Conditions of Release as to Charles Thomas Dickerson (Signed by Magistrate Judge W. C. Sewell). Copies set. Order stayed until 1-31-97 @ 5:00 pm. [1:97-m-83] (ntho) [Entry date 01/30/97]
1/30/97	5	MOTION to lift stay of release order as to Charles Thomas Dickerson by USA [1:97-m-83] (ntho) [Entry date 01/31/97]
1/30/97	—	Oral ORDER as to Charles Thomas Dickerson granting [5-1] motion by USA as to Charles Thomas Dickerson (1) (Signed by Magistrate Judge W. C. Sewell) Copies Mailed: y. [1:97-m-83] (ntho) [Entry date 01/31/97]
1/30/97	—	notation staying order of execution of release is deleted on original conditions by Judge W. C. Sewell as to Charles Thomas Dickerson [1:97-m-83] (ntho) [Entry date 01/31/97]
1/31/97	6	AMENDED ORDER setting conditions of release as to Charles Dickerson (Signed by Magistrate Judge W. C. Sewell) [1:97-m-83] (ntho) [Entry date 01/31/97]
2/3/97	—	DEFT. released on Bond. ORDER Setting Conditions of Release—executed. Deft. released. Copies sent. [1:97-m-83] (jsch) [Entry date 02/03/97]
2/19/97	7	JOINT MOTION by Charles Thomas Dickerson and USA to Extend Time to Indict thru 3/31/97 [1:97-m-83] (rtra) [Entry date 02/27/97]
2/25/97	8	ORDER as to Charles Thomas Dickerson granting [7-1] joint motion by Charles Thomas Dickerson and USA to Extend Time to Indict thru 3/31/97 as to Charles Thomas Dickerson (1) (Signed by Judge Albert V. Bryan Jr.) Copies Mailed: 02.25.97 [1:97-m-83] (rtra) [Entry date 02/27/97]

DATE	NO.	PROCEEDINGS
3/25/97	9	JOINT MOTION by Charles Thomas Dickerson and USA to Extend Time to Indict thru 4/30/97 [1:97-m-83] (rtra) [Entry date 03/26/97]
3/25/97	10	ORDER as to Charles Thomas Dickerson granting [9-1] joint motion by Charles Thomas Dickerson and USA to Extend Time to Indict thru 4/30/97 as to Charles Thomas Dickerson (1) (Signed by Judge Albert V. Bryan Jr.) Copies Mailed: 03.25.97 [1:97-m-83] (rtra) [Entry date 03/26/97]
4/16/97	11	INDICTMENT, a true bill, returned in open court before JCC as to Charles Thomas Dickerson (1) count(s) 1, 2, 3, 4, 5, 6, 7. Summons to issue. Counsel notified of arraignment. (bonn) [Entry date 04/18/97] [Edit date 04/18/97]
4/16/97	—	Arraignment set for 9:00 4/28/97 (bonn) [Entry date 04/18/97]
4/17/97	—	SUMMONS returnable for 04/28/97 at 9:00 a.m. issued & given to USMS for service for Charles Thomas Dickerson (bonn) [Entry date 04/18/97]
4/28/97	—	Arraignment as to Charles Thomas Dickerson held. Deft. WFA, PNG and demanded trial by jury. 20 days to file motions. Motion Hearing set for 9:00 5/30/97 for Charles Thomas Dickerson Jury Trial set for 10:00 7/1/97 for Charles Thomas Dickerson; before Judge James C. Cacheris (Reporter) USA appeared through: R. Spencer Dft(s) appeared with: J. McCarthy. All exhibits, etc. to be filed w/clerk w/i 5 working days before trial. Deft's bond cont. (rwar) [Entry date 04/30/97]

DATE	NO.	PROCEEDINGS
4/28/97	—	APPEARANCE Through Counsel by Charles Thomas Dickerson (rwar) [Entry date 04/30/97]
4/28/97	12	MARSHAL'S return on summons returned unexecuted 04/24/97 as to Charles Thomas Dickerson (bonn) [Entry date 05/01/97]
5/19/97	13	MOTION by Charles Thomas Dickerson for Disclosure of All Composite Drawings Created in Investigation and related evidence of exculpatory nature (bonn) [Entry date 05/19/97]
5/19/97	14	MOTION by Charles Thomas Dickerson to Compel Disclosure of Favorable Evidence against Witnesses not called to the stand by the govt (bonn) [Entry date 05/19/97]
5/19/97	15	MOTION by Charles Thomas Dickerson for Production of Interview Reports with Individuals who will not be called as witnesses at trial (bonn) [Entry date 05/19/97]
5/19/97	16	MOTION by Charles Thomas Dickerson for Disclosure of Electronic Surveillance (bonn) [Entry date 05/19/97]
5/19/97	17	MOTION for leave to submit questionnaire to the jury panel pretrial and for leave individually to question each member of the venire filed by Charles Thomas Dickerson (bonn) [Entry date 05/19/97]
5/19/97	18	MOTION by Charles Thomas Dickerson to Suppress Statements and Physical Evidence (bonn) [Entry date 05/19/97]
5/19/97	19	MOTION for notice by the govt of the intention to use evidence arguably subject to suppression filed by Charles Thomas Dickerson (bonn) [Entry date 05/19/97]

DATE	NO.	PROCEEDINGS
5/19/97	20	EX PARTE MOTION filed underseal by Charles Thomas Dickerson (Denied 05/20/97 by AVB) (bonn) [Entry date 05/21/97]
5/20/97	21	ORDER as to Charles Thomas Dickerson, for Discovery & Inspection—entered & filed (Signed by Judge Albert V. Bryan Jr.) Copies Mailed: Yes (bonn) [Entry date 05/21/97]
5/23/97	22	OPPOSITION to Deft's Motions filed by US (bonn) [Entry date 05/27/97]
5/27/97	23	MEMORANDUM by Charles Thomas Dickerson in support of Deft's motion to Suppress Statements and Physical Evidence (jwil) [Entry date 05/27/97]
5/28/97	24	SUPPLEMENTAL MEMORANDUM by Charles Thomas Dickerson in support of Deft's motion to Suppress Statements and Physical Evidence (jwil) [Entry date 05/28/97]
5/29/97	25	SUPPLEMENTAL MEMORANDUM by USA as to Charles Thomas Dickerson in opposition to Deft's motions to suppress (jwil) [Entry date 05/29/97]
5/30/97	—	Motion hearing held as to Charles Thomas Dickerson re: [18-1] motion by Charles Thomas Dickerson to Suppress Statements and Physical Evidence before Judge James C. Cacheris (Reporter: Farmer) USA appeared through: R. Spencer Dft(s) appeared with J. McCarthy. Evidence heard. Motion taken under advisement. (rwar) [Entry date 06/06/97]
6/3/97	26	SECOND SUPPLEMENTAL MEMORANDUM by Charles Thomas Dickerson in support of [18-1] motion to Suppress Statements and Physical Evidence (bonn) [Entry date 06/03/97]

DATE	NO.	PROCEEDINGS
6/18/97	27	EX PARTE UNDERSEAL MOTION by Charles Thomas Dickerson for counsel to withdraw (bonn) [Entry date 06/25/97]
6/18/97	28	ORDER granting ex parte underseal [27-1] motion—entered & filed (Signed by Judge James C. Cacheris) Copies Mailed: Yes (bonn) [Entry date 06/25/97]
6/18/97	29	ORDER as to Charles Thomas Dickerson, Appointing James W. Hundley as counsel—entered & filed (Signed by Judge James C. Cacheris) Copies Mailed: Yes (bonn) [Entry date 06/25/97]
6/20/97	30	MOTION by Charles Thomas Dickerson to Continue Trial Date (bonn) [Entry date 06/25/97]
6/20/97	31	ORDER that this matter is continued for trial by jury to 08/19/97. This time is excludable under the Speedy Trial—entered & filed (Signed by Judge James C. Cacheris) Copies Mailed: Yes (bonn) [Entry date 06/25/97]
6/24/97	32	SUPERSEDING INDICTMENT as to Charles Thomas Dickerson (1) count(s) 1s, 2s, 3s, 4s, 5s, 6s, 7s. Counsel notified of arraignment. (bonn) [Entry date 06/25/97]
6/30/97	—	Arraignment as to Charles Thomas Dickerson on superseding ind. held Motion Hearing set for 9:00 7/25/97 for Charles Thomas Dickerson Motion Filings due w/i 10 days; Jury Trial set for 10:00 8/19/97 for Charles Thomas Dickerson; before Judge Albert V. Bryan Jr. (Reporter: McCoy.) USA appeared through: Spencer. Dft(s) appeared w/counsel Hundley. All exhibits, etc. to be filed w/Clerk w/i 5 working days before trial. Deft. released on present bond. (spoo) [Entry date 07/10/97]

DATE	NO.	PROCEEDINGS
7/1/97	33	TRANSCRIPT as to Charles Thomas Dickerson of proceedings of 05/30/97 (JCC) (bonn) [Entry date 07/03/97]
7/1/97	34	ORDER that deft's motion to suppress is granted at [sic] to his statements offered at the FBI Field Office on 01/27/97, and its items discovered during the search of his home that evening. That deft's motion to suppress is denied as to the search of his Oldsmobile Cierra—entered & filed (Signed by Judge James C. Cacheris) Copies Mailed: Yes (bonn) [Entry date 07/03/97]
7/1/97	35	MEMORANDUM OPINION as to Charles Thomas Dickerson—filed (Signed by Judge James C. Cacheris) (bonn) [Entry date 07/03/97]
7/11/97	36	MOTION by Charles Thomas Dickerson to Suppress (bonn) [Entry date 07/14/97]
7/11/97	37	NOTICE of Hearing as to Charles Thomas Dickerson:, Motion Hearing set for 9:00 7/25/97 for Charles Thomas Dickerson for [36-1] motion by Charles Thomas Dickerson to Suppress (bonn) [Entry date 07/14/97]
7/11/97	38	MOTION by Charles Thomas Dickerson in Limine (bonn) [Entry date 07/14/97]
7/11/97	39	NOTICE of Hearing as to Charles Thomas Dickerson:, Motion Hearing set for 9:00 7/25/97 for Charles Thomas Dickerson for [38-1] motion by Charles Thomas Dickerson in Limine (bonn) [Entry date 07/14/97]
7/11/97	40	MOTION by Charles Thomas Dickerson for Reconsideration of [34-1] order of 07/01/97 (bonn) [Entry date 07/14/97]

DATE	NO.	PROCEEDINGS
7/11/97	41	NOTICE of Hearing as to Charles Thomas Dickerson:, Motion Hearing set for 9:00 7/25/97 for Charles Thomas Dickerson for [40-1] motion by Charles Thomas Dickerson for Reconsideration of [34-1] order of 07/01/97 (bonn) [Entry date 07/14/97]
7/15/97	42	MOTION as to Charles Thomas Dickerson by USA for Reconsideration of 07/01/97 Order (bonn) [Entry date 07/18/97]
7/21/97	43	AMENDED NOTICE of Hearing as to Charles Thomas Dickerson:, Motion Hearing set for 9:00 8/1/97 for Charles Thomas Dickerson for [40-1] motion by Charles Thomas Dickerson for Reconsideration of [34-1] order of 07/01/97, set for 9:00 8/1/97 for Charles Thomas Dickerson for [38-1] motion by Charles Thomas Dickerson in Limine, set for 9:00 8/1/97 for Charles Thomas Dickerson for [36-1] motion by Charles Thomas Dickerson to Suppress (jwil) [Entry date 07/21/07]
7/28/97	44	MEMORANDUM by Charles Thomas Dickerson in opposition to [42-1] motion by USA for Reconsideration (jwil) [Entry date 07/28/97]
7/28/97	45	RESPONSE by USA as to Charles Thomas Dickerson in opposition to [38-1] motion by Charles Thomas Dickerson in Limine (bonn) [Entry date 07/29/97]
7/28/97	46	OPPOSITION by USA to [40-1] motion for Reconsideration of [34-1] order of 07/01/97, [36-1] motion to Suppress (bonn) [Entry date 07/29/97]
8/1/97	—	Motion hearing held before Judge Cacheris as to Charles Thomas Dickerson re: (Farmer) USA appeared through: Rob Spencer/Kathy

DATE	NO.	PROCEEDINGS
		Kahoe. Dft(s) appeared through: James Hundley. On for cross motions for reconsideration—argued and under advisement. Deft motion in limine—argued and granted in part and denied in part. Order to follow. (jsol) [Entry date 08/01/97]
8/1/97	47	SECOND SUPPLEMENTAL Opposition by USA as to Charles Thomas Dickerson Motion to Suppress—field 6/3/97 (jsol) [Entry date 08/04/97]
8/4/97	48	MEMORANDUM OPINION as to Charles Thomas Dickerson (Signed by Judge James C. Cacheris) c/m (jsol) [Entry date 08/04/97]
8/4/97	49	ORDER in accordance w/Memo Opinion as to Charles Thomas Dickerson that the [42-1] motion by USA for Reconsideration of 07/01/97 Order is denied: [40-1] motion by Charles Thomas Dickerson for Reconsideration of [34-1] order of 07/01/97 is denied (Signed by Judge James C. Cacheris) Copies Mailed: y (jsol) [Entry date 08/04/97]
8/6/97	50	ORDER that this matter is stayed pending appeal. Counsel shall appear at 9:00 a.m. on 11/14/97 to report the status of the appeal as to Charles Thomas Dickerson—entered & filed (Signed by Judge James C. Cacheris) Copies Mailed: Yes (bonn) [Entry date 08/07/97]
9/2/97	51	TRANSCRIPT filed in case as to Charles Thomas Dickerson for dates of August 1, 1997 (clar) [Entry date 09/02/97]
9/2/97	52	NOTICE of orders of 08/04/97 and 07/01/97 filed by USA as to Charles Thomas Dickerson (bonn) [Entry date 09/08/97]

DATE	NO.	PROCEEDINGS
9/8/97	—	Notice of appeal and copy of docket entries and orders of 08/04/97 & 07/01/97 as to Charles Thomas Dickerson to USCA (bonn) [Entry date 09/08/97]
9/17/97	—	USCA Case Number as to Charles Thomas Dickerson Re: [52-1] appeal USCA Number: 97-4750 Case Manager: Barbara Rowe (bonn) [Entry date 09/24/97]
9/24/97	—	CERTIFICATE designating the record as complete for purposes of appeal transmitted to USCA. (bonn) [Entry date 09/24/97]
10/10/97	53	MOTION by Charles Thomas Dickerson to Modify Conditions of Release (bonn) [Entry date 10/14/97]
10/10/97	54	NOTICE of Hearing as to Charles Thomas Dickerson:, Motion Hearing set for 9:00 10/17/97 for Charles Thomas Dickerson for [53-1] motion by Charles Thomas Dickerson to Modify Conditions of Release (bonn) [Entry date 10/14/97]
10/16/97	55	ORDER as to Charles Thomas Dickerson granting [53-1] motion by Charles Thomas Dickerson to Modify Conditions of Release as to Charles Thomas Dickerson (1) The Courts [sic] conditions of release are modified to permit the Defendant to actively seek and maintain employment. All other condition [sic] of release in place prior to the entry of this order shall remain in effect. (signed by Magistrate Judge W. Curtis Sewell) Copies Mailed: 10.16.97 (rtra) [Entry date 10/16/97]
8/14/98	56	MOTION by Charles Thomas Dickerson to Modify Conditions of Release (bsha) [Entry date 08/17/98]

DATE	NO.	PROCEEDINGS
8/14/98	57	NOTICE of Hearing as to Charles Thomas Dickerson:, Motion Hearing set for 9:00 8/21/98 for Charles Thomas Dickerson for [56-1] motion by Charles Thomas Dickerson to Modify Conditions of Release (bsha) [Entry date 08/17/98]
8/17/98	58	RESPONSE by USA as to Charles Thomas Dickerson in opposition to [56-1] motion by Charles Thomas Dickerson to Modify Conditions of Release (rtra) [Entry date 08/18/98]
8/21/98	—	Motion hearing held as to Charles Thomas Dickerson re: [56-1] motion by Charles Thomas Dickerson to Modify Conditions of Release before Magistrate Judge W. C. Sewell (Tape #176) USA appeared through: R. Spencer. Dft(s) appeared through: NOT-atty; Hundley is present. Deft. argues to have electronic monitoring removed—US argues that it should remain. Defts motion to modify bond in denied. motion to modify bond is argued and-denied (ntho) [Entry date 08/21/98]
8/21/98	59	ORDER as to Charles Thomas Dickerson denying [56-1] motion by Charles Thomas Dickerson to Modify Conditions of Release as to Charles Thomas Dickerson (1) (Signed by Magistrate Judge W. C. Sewell) Copies Mailed: y (ntho) [Entry date 08/21/98]
8/31/98	60	Defendant's APPEAL of Order Denying Motion to Modify Conditions of Release by Charles Thomas Dickerson (agil) [Entry date 09/03/98]
8/31/98	61	NOTICE of Hearing as to Charles Thomas Dickerson:, for 9/11/98 @ 9:00 a.m. (agil) [Entry date 09/03/98]

DATE	NO.	PROCEEDINGS
9/9/98	62	OPPOSITION to deft's appeal of order denying his motion to modify conditions of release filed by US. (bonn) [Entry date 09/10/98]
9/10/98	—	Minute entry as to Charles Thomas Dickerson: before Judge T. S. Ellis III (Reporter: S. Moses) USA appeared through: Spencer. Deft. appeared w/ counsel Hundley. Matter came on for hearing on deft's appeal of Mag. Judge's decision denying motion to modify conds. of release—argued and denied. Deft. cont'd on bond. (pete) [Entry date 09/14/98]
9/10/98	63	ORDER that for reasons stated from the bench, deft's conds. of release be cont'd as ordered by the Court on 1/30/97, ent—filed (Signed by Judge T. S. Ellis III) Copies Mailed: yes (pete) [Entry date 09/14/98]
2/9/99	64	COPY of opinion of USCA, decided 02/08/99, reversing the district's court order suppressing the statements of deft. and remanding the case for fu ther proceedings. (bonn) [Entry date 02/10/99]
2/17/99	65	COPY of opinion of USCA decided 02/08/99, reversing the decision of the USDC and remanding for further proceedings (bonn) [Entry date 02/23/99]
2/24/99	66	Letter from USCA that the mandate will not issue at this time because a petition for rehearing has been filed as Charles Thomas Dickerson (bonn) [Entry date 02/25/99]
4/1/99	67	ORDER from the USCA that the court denies the petition for rehearing en banc as to Charles Thomas Dickerson (bonn) [Entry date 04/02/99]

DATE	NO.	PROCEEDINGS
4/8/99	68	CERTIFIED copy of Judgment of USCA together with opinion, decided 02/08/99, reversing the district court's order regarding the suppression of evidence and remanding for further proceedings (bonn) [Entry date 04/08/99]
4/12/99	69	ORDER that this matter is placed on the arraignment calendar for 05/10/99 for setting of a trial date as to Charles Thomas Dickerson—entered & filed (Signed by Judge James C. Cacheris) Copies Mailed: Yes (bonn) [Entry date 04/12/99]
4/12/99	—	Arraignment set for 9:00 5/10/99 for Charles Thomas Dickerson (bonn) [Entry date 04/12/99]
4/16/99	70	ORDER from the USCA that the grants [sic] deft. Charles Thomas Dickerson motion to recall and stay the mandate pending the filing of a petition for writ of certiorari pursuant to Rule 41(d) (bonn) [Entry date 04/19/99]
8/10/99	71	Letter from USCA that a writ of certiorari has been filed as to Charles Thomas Dickerson (bonn) [Entry date 08/11/99]
12/10/99	72	Copy of Letter from USCA that a Supreme Court Order was filed on 12/6/99 granting certiorari as to Charles Thomas Dickerson. (dper) [Entry date 12/14/99]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4750

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

CHARLES THOMAS DICKERSON,
Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
9/15/97	Criminal case docketed. (bhr)
9/15/97	CLERK ORDER FILED appointing James W. Hundley as CJA counsel for Appellee Charles Thomas Dickerson [2630842-1] Nunc Pro Tunc Date: 09/02/97. Copies to all counsel. [97-4750] (bhr)
9/15/97	Docketing notice issued. [97-4750] (bhr)
9/17/97	Docketing statement filed by Appellant [2633112-1] T/S needed: y; T/S already on file: y . [97-4750] (bhr)
9/17/97	Briefing order filed. [97-4750] Appellant brief/ joint appendix due 10/22/97 for US . (bhr)
9/18/97	Appearance form filed by Vincent L. Gambale. [97-4750] (bhr)
9/26/97	Certification of ROA complete and retained in the District Court. . [97-4750] (bhr)

DATE	PROCEEDINGS
10/16/97	Motion filed by Appellant US to extend time to file appellant(s) brief until 11/5/97 [2648986-1] . [97-4750] (bhr)
10/16/97	CLERK ORDER FILED granting motion to extend time to file a's brief [2648986-1] Appellant(s) brief/joint appendix now due 11/5/97 for US Conf aty recomm?: n. Number of days granted: 14. Copies to all counsel. [97-4750] (bhr)
10/27/97	Appearance form filed by James Warren Hundley for Appellee Charles Thomas Dickerson. [97-4750] (dsd)
11/5/97	Brief joint appendix filed by Appellant US. Type of Service: PM Copies of brief: 8 # brf pages: 62 Copies of apx: 6 # apx pages: 168 Sufficient? [Y/N] : Y 2-sided copying: Y SEALED?[Y/N] : Y [97-4750] Appellee brief due 11/26/97 for Charles Thomas Dickerson . (aww)
11/10/97	Motion filed by Potential Amicus Curiae Washington Legal, Potential Amicus Curiae Safe Streets Coaliti to file amicus brief [2663221-1] [97-4750] (bhr)
11/10/97	CLERK ORDER FILED granting motion to file amicus brief [2663221-1] Amicus brief due 11/10/97 for Safe Streets Coaliti, for Washington Legal . Copies to all counsel. [97-4750] (bhr)
11/10/97	Amicus curiae brief filed by Amicus Curiae Washington Legal, Amicus Curiae Safe Streets Coaliti. Type of Service: G-per clerk order dated 11/10/97 # am.br copies: 8 Sufficient [Y/N]?: Y. . [97-4750] (llh)
11/24/97	Appearance form filed by Paul George Cassell. [97-4750] (bhr)
11/28/97	Case tentatively calendared for oral argument Term: February Place: Ric, Bal, Spa. SUBMISSION DEADLINE: 12/8/97. (jc)

DATE	PROCEEDINGS
12/1/97	Brief filed by Appellee Charles Thomas Dickerson. Type of Service: PM Copies: 6 # brf pages: 29. Sufficient [Y/N]: Y. [97-4750] (llh)
12/15/97	Case calendared for oral argument. [97-4750] (jc)
12/15/97	Reply brief filed by Appellant US. Type of Service: PM Copies of brief: 8 # brf pages: 20. Sufficient [Y/N]: Y. . . [97-4750] (llh)
1/9/98	Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae Washington Legal, Amicus Curiae Safe Streets Coalition [2696078-1] [97-4750] (llh)
1/14/98	Motion filed by Amicus Curiae Washington Legal, Amicus Curiae Safe Streets Coaliti to participate in oral argument [2698577-1] [97-4750] (bhr)
1/21/98	COURT ORDER filed granting motion of amici curiae to participate in oral arg [2698577-1] sharing 5 minutes of the government's allotted time. Copies to all counsel. [97-4750] (bhr)
1/30/98	Oral argument heard. James Warren Hundley for Appellee Charles Thomas Dickerson Courtroom Deputy: br. [97-4750] (bwr)
2/8/99	Published, authored opinion filed. [97-4750] (bhr)
2/8/99	Judgment order filed. Decision: reversed and remanded with dissent. [97-4750] (bhr)
2/8/99	Criminal Justice Act 20 voucher #0644435 issued to James Warren Hundley. [97-4750] (bhr)
2/19/99	Motion filed by Potential Amicus Curiae Federal Public Def for leave to file amicus brief in support of appellant's petition for rehearing which is forthcoming. Brief Tendered? (Y/N): n [2936443-1]. [97-4750] (bhr)

DATE	PROCEEDINGS
2/22/99	Motion filed by Potential Amicus Curiae American Civil Lib for leave to file amicus brief in support of petition for rehearing and rehearing en banc. Brief Tendered? (Y/N): y [2937628-1]. [97-4750] (bhr)
2/22/99	Motion filed by Potential Amicus Curiae NACDL for leave to file amicus brief in support of petition for rehearing. Brief Tendered? (Y/N): y [2937645-1] [97-4750] (bhr)
2/22/99	Petition filed by Appellee Charles Thomas Dickerson for rehearing. Number copies filed: 20 [2937761-1]., for rehearing en banc. Number of copies filed: 20 [2937761-2] [97-4750] (dsd)
2/25/99	Document referencing motion for rehearing [2937761-1], motion for rehearing en banc [2937761-2] filed by Appellee (Replacements of the initial pet. reh. filed. Some corrections were made) [2939673-1] [97-4750] (bhr)
2/26/99	COURT ORDER filed granting motion to file am. br support pet. reh [2936443-1] Amicus brief due 3/8/99 for Office of the Public Defender. Copies to all counsel. [97-4750] (bhr)
2/26/99	Response/answer requested to motion for rehearing [2937761-1], motion for rehearing en banc [2937761-2] for US due 3/8/99. [97-4750] (bhr)
3/8/99	Amicus curiae brief in support of the petition for rehearing filed by Office of the Public Defender. # am. br copies: 8 Sufficient [Y/N]?: y. n. (bhr)
3/8/99	Response/answer filed [2946326-1] by Appellant US to motion for rehearing [2937761-1], motion for rehearing en banc [2937761-2] [97-4750] (bhr)
3/12/99	Response/answer requested to motion for rehearing [2937761-1], motion for rehearing en banc [2937761-2] [97-4750] (bhr)

DATE	PROCEEDINGS
3/15/99	Appearance form filed by Lisa Simotas. [97-4750] (bhr)
3/22/99	Response/answer filed [2954848-1] by Amicus Curiae Washington Legal to motion for rehearing [2937761-1], motion for rehearing en banc [2937761-2] [97-4750] (bhr)
3/30/99	COURT ORDER filed granting motion to file am. br support pet. reh [2937628-1], granting motion to file am. br support pet. reh [2937645-1] Copies to all counsel. [97-4750] (psc)
3/30/99	COURT ORDER filed denying motion for rehearing [2937761-1], denying motion for rehearing en banc [2937761-2] Copies to all counsel. [97-4750] (psc)
4/1/99	Corrected order filed acting on referencing motion for rehearing [2937761-1], referencing motion for rehearing en banc [2937761-2]. [97-4750] (dsd)
4/7/99	Mandate issued. [97-4750] (bhr)
4/9/99	Motion filed by Appellee Charles Thomas Dickerson to recall the mandate pending filing a petition for writ of certiorari to the Supreme Court. [2966872-1]. [2966872-1] [97-4750] (bhr)
4/14/99	COURT ORDER filed granting motion to recall the mandate [2966872-1] staying the mandate [2969069-1]. until pending filing of cert Copies to all counsel. [97-4750] (dsd)
4/15/99	Motion filed by Appellant US [2969699-1] for reconsideration of court order to stay/recall mandate [2969069-1] [97-4750] (bhr)
4/15/99	Response/answer requested to motion for reconsideration [2969699-1] Response/answer due 4/26/99 for Safe Streets Coaliti, for Washington Legal, for Charles Thomas Dickerson. [97-4750] (bhr)

DATE	PROCEEDINGS
4/26/99	Response/answer filed [2975035-1] by Amicus Curiae NACDL to motion for reconsideration [2969699-1] [97-4750] (bhr)
4/26/99	Response/answer filed [2975039-1] by Amicus Curiae Washington Legal to motion for reconsideration [2969699-1] [97-4750] (bhr)
4/26/99	Response/answer filed [2975640-1] by Appellee Charles Thomas Dickerson to motion for reconsideration [2969699-1] [97-4750] (bhr)
5/3/99	COURT ORDER filed denying motion for reconsideration of order recalling mandate [2969699-1] Copies to all counsel. [97-4750] (bhr)
8/9/99	Supreme Court notice that petition for certiorari was filed on 07/30/99. Spct No.: 99-5525 Spct Pty 1: Charles Thomas Dickerson Spct Pty 2: United States. [97-4750] (cw)
12/9/99	Supreme Court order received granting petition certiorari [3035303-1] on 12/06/99. [97-4750] (elf)

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place Wahington, D.C.
Date 1/27/97
Time 9:40 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed /s/ Charles Dickerson

Witness: /s/ Christopher Lawlor SA, FBI, WFO,
1/27/97

Witness: Det. Thomas Durkin #783

Time: 9:41 p.m.

FEDERAL BUREAU OF INVESTIGATION
Date of transcription 1/29/97

CHARLES THOMAS DICKERSON, black male, date of birth October 8, 1972, SSAN: 579-98-6292, 8313 Garland Avenue, apartment three, Takoma Park, Maryland, was interviewed by Special Agent Christopher Lawlor and Alexandria, Virginia Police Department Detective Thomas Durkin at the Washington Field Office of the Federal Bureau of Investigation (FBI). DICKERSON was advised of the identities of the interviewers and the nature of the interview, that being his knowledge of a bank robbery that occurred in Alexandria, Virginia, on January 24, 1997. DICKERSON was advised of his rights, signed the waiver portion of the rights form, and provided the following information:

Initially, DICKERSON stated that on Friday, January 24, 1997, he drove to the Old Town Alexandria, Virginia, area to look at a seafood restaurant where he planned to take a friend for her birthday. The friend's nickname was "SULKY" and her birthday was February 15th. DICKERSON did not know "SULKY's" true name. DICKERSON was driving his white Oldsmobile Ciera. At about 9:30 or 10:00 a.m., after seeing the restaurant, he parked his car and went to buy a bagel. When he returned to his car, he saw a friend named Terrance (Last Name Unknown--LNU), who asked for a ride to Suitland, Maryland. DICKERSON described TERRANCE LNU as a black male, approximately 19 to 20 years old, light complected, with thick, braided hair. TERRANCE LNU was wearing a light-colored jacket with a hood and blue jeans. TERRANCE was not carrying anything. DICKERSON stated that he drove TERRANCE LNU to Suitland, Maryland, and dropped him off near a liquor store, between Suitland Road and Silver

Hill Road. DICKERSON then went to the Tooley Street Station area, to the home of a girl named MISSY LNU, to visit with a girl named TOYA LNU. DICKERSON returned to his home in Takoma Park, Maryland, at about 1:00 p.m., and stayed there until about 3:30 or 4:00 p.m.

At this time, during the interview, DICKERSON was told that FBI agents had been surveilling his house since prior to 1:00 p.m., and that he was not observed coming to or from the house. DICKERSON was also advised that a federal search warrant had just been issued and that agents were about to start a search of his residence.

Shortly thereafter, DICKERSON recanted his first account of what occurred on January 24, 1997, and provided the following information.

DICKERSON said that when FBI agents searched his home, they would likely find dye-stained money and a silver-colored, .45 caliber pistol. DICKERSON said that he came to the door, when agents initially knocked at his door, with the pistol in his hand. DICKERSON decided to hide the gun prior to opening the door for the agents.

DICKERSON knows a man named JIMMY LNU, who is married to DICKERSON's cousin, RENA THOMAS. JIMMY LNU lives in the Oxon Hill Village apartments in Oxon Hill, Maryland. DICKERSON knows that JIMMY LNU is a bank robber, because JIMMY LNU told him that he was wanted in Atlanta, Georgia, for bank robbery. JIMMY LNU fled Georgia three to four months ago, after committing fifteen to twenty bank robberies in the Atlanta, Georgia area. On three or four occasions since September, 1996, JIMMY LNU brought dye-stained money to DICKERSON and asked him to clean the money. JIMMY LNU taught DICKERSON

how to clean dye from money by using a product called M-1 cleaner. DICKERSON said that he got the silver, .45 caliber pistol from JIMMY LNU on Friday, January 24, 1997. DICKERSON said that, in the past, he has seen JIMMY LNU with a black, snub-nosed, .38 caliber revolver and a black, long-barrelled, .38 caliber revolver.

On Friday, January 24, 1997, DICKERSON and JIMMY LNU drove to Alexandria, Virginia, to look at a seafood restaurant, because DICKERSON wanted to make reservations for Valentine's day. The restaurant was closed, so DICKERSON drove westbound on King Street to buy bagels. DICKERSON parked in an area about two blocks south of King Street and walked to the bagel store, while JIMMY LNU waited in the car. As DICKERSON was walking away from the car, he saw JIMMY LNU get out of the car and walk away. When DICKERSON returned to the car, after buying a bagel, JIMMY LNU was in the car. DICKERSON got in the car and started to drive away. JIMMY LNU told DICKERSON to stop the car, and DICKERSON complied. JIMMY LNU then got out of the car and walked out of DICKERSON's sight. DICKERSON thought that JIMMY LNU may have gotten out of the car, because he needed to use a bathroom. A short while later, JIMMY LNU came back to the car and told DICKERSON to drive off. After traveling only a short distance, near a stop sign, JIMMY LNU told DICKERSON that he wanted to put something in the trunk. DICKERSON used the remote button to open the trunk. JIMMY LNU got out and went to the trunk area, put something in the trunk, and then returned to the car. As they drove away, they approached a traffic signal that was red, and JIMMY LNU told DICKERSON to "run" the light. DICKERSON noticed a CHEVY CHASE BANK on the corner and thought that JIMMY LNU may have robbed a bank.

After leaving Alexandria, Virginia, DICKERSON drove drove JIMMY LNU to the Tooley Street Station area, near Suitland, Maryland. They went to MISSY LNU's house and JIMMY LNU went upstairs for awhile. They then left MISSY's house and got haircuts at STYLES IN MOTION, on Suitland Road. After they got haircuts and returned to the car, JIMMY LNU gave DICKERSON the silver-colored, .45 caliber pistol. JIMMY LNU retrieved the gun from under the passenger-side floor mat. Prior to JIMMY LNU removing the gun, DICKERSON did not know it was there. DICKERSON then took JIMMY LNU to his apartment in Oxon Hill Village. While driving to Oxon Hill Village, they stopped at a liquor store off St. Barnabas Road. When they arrived at JIMMY LNU's apartment, they both went inside. JIMMY LNU then gave DICKERSON about forty or fifty dollars to cover gas and cellular telephone expenses.

Although he never said anything to JIMMY LNU, DICKERSON thought that "something was up."

At this time, during the interview, DICKERSON was shown a sheet of paper depicting photocopied pictures labeled CHARLES THOMAS DICKERSON, ALAN COURTNEY GREEN, and RODERICK PRIDE THOMAS. DICKERSON identified the picture of GREEN as JIMMY LNU. DICKERSON said that he and the other two men had been arrested outside a bank in Montgomery County, Maryland. THOMAS subsequently confessed to attempted bank robbery, and the charges against DICKERSON and JIMMY LNU "did not stand up in court." The three men had arrived at the bank in a car driven by DICKERSON, but DICKERSON was not aware that THOMAS planned to rob the bank.

DICKERSON was then advised that he was under arrest. At this time, DICKERSON volunteered to point

out JIMMY LNU's apartment. Prior to placing DICKERSON in the Alexandria Jail, DICKERSON directed the interviewers to the Oxon Hill Village apartments and pointed out JIMMY LNU's apartment.

Investigation on 1/27/97 at Washington, D.C.

File #91A-WF-206491-28 Date dictated 1/29/97

by SA Christopher Lawlor

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA

v.

CHARLES THOMAS DICKERSON,
Defendant.

Criminal No. 97-159-A

Count 1
18 U.S.C. § 371 (Conspiracy)

Counts 2-4
18 U.S.C. §§ 2113(a) and (d) and 2
(Bank Robbery/Aiding and Abetting)

Counts 5-7
18 U.S.C. §§ 924(c) and 2
(Use of Firearm During Crime of Violence/Aiding and Abetting)

SUPERSEDING INDICTMENT

JUNE 1997 TERM—At Alexandria

Count 1

(Conspiracy)

THE GRAND JURY CHARGES THAT:

From in or about September 1996 through in or about January 1997, in the Eastern District of Virginia and elsewhere, defendant CHARLES THOMAS DICKERSON

and unindicted co-conspirators, knowingly, willfully, and unlawfully combined, conspired, confederated, and agreed together with each other and with others known and unknown to this grand jury:

1. to commit offenses against the United States of America, namely:

a. *Bank Robbery,* in violation of Title 18, United States Code, Section 2113(a) and (d), by unlawfully, knowingly, and by force, violence, and intimidation, taking from the person and presence of another money belonging to and in the care, custody, and possession of banks, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offenses assaulting and putting in jeopardy the lives of persons in the banks by use of a dangerous weapon.

MANNER AND MEANS OF THE CONSPIRACY

The purpose of the conspiracy was to obtain money belonging to and in the care, custody, and possession of banks. The manner and means by which the conspirators conducted the conspiracy included the following:

1. It was part of the conspiracy that the defendant and his co-conspirators would survey or "case" a bank they intended to rob by having DICKERSON enter the bank and gather information about the size of the bank and its security features.

2. It was further part of the conspiracy that, following DICKERSON's surveillance of the bank, an unindicted co-conspirator or conspirators would enter the bank, approach a bank teller, display a handgun, and demand money from the teller.

3. It was further part of the conspiracy that an unindicted co-conspirator would hand the teller a backpack and order the teller to fill the backpack with money.

4. It was further part of the conspiracy that DICKERSON and his unindicted co-conspirators took money from federally insured banks.

5. It was further part of the conspiracy that DICKERSON and his unindicted co-conspirators would flee the scene of bank robberies in DICKERSON's car.

6. It was further part of the conspiracy that DICKERSON would wash and attempt to wash currency stained by the dye from exploding bank security devices.

OVERT ACTS

In furtherance of the aforementioned conspiracy and to effect the objects thereof, the defendant and co-conspirators performed the following overt acts in the Eastern District of Virginia and elsewhere:

1-8. On or about the dates set forth below, in the location set forth below, defendant DICKERSON and unindicted co-conspirators unlawfully, knowingly, and by force, violence, and intimidation, took from the person and presence of another, specifically a bank teller, money belonging to and in the care, custody, and possession of the federally insured bank set forth below, and in committing such offenses assaulted and put in jeopardy the life of persons in the bank by use of a dangerous weapon:

Overt Act	Date	Bank	Location
1.	9/19/96	First National Bank of Maryland	12041 Georgia Ave. Wheaton, MD
2.	10/8/96	Citizens National Bank	3386 Laurel/Ft. Meade Rd. Laurel, MD
3.	10/18/96	NationsBank	600 N. Washington St. Alexandria, VA
4.	11/8/96	Central Fidelity Bank	11 Canal Ctr. Plaza Alexandria, VA

Overt Act	Date	Bank	Location
5.	11/22/96	Maryland Federal Savings	9546 Livingston Rd. Ft. Washington, MD
6.	12/7/96	First Virginia Bank of Maryland	9412 Livingston Rd. Ft. Washington, MD
7.	1/8/97	Citizens National Bank	3314 Superior Ln. Bowie, MD
8.	1/24/97	First Virginia Bank	300 S. Washington St. Alexandria, VA

9. On or about September 27, 1996, in Wheaton, Maryland, defendant DICKERSON and two unindicted co-conspirators unlawfully, knowingly, and by force, violence, and intimidation, attempted to take from the person and presence of another, specifically a bank teller, money belonging to and in the care, custody, and possession of a federally insured bank, namely, the NationsBank, 2601 University Boulevard, Wheaton, Maryland, and in committing such offenses assaulted and put in jeopardy the life of persons in the bank by use of a dangerous weapon, namely a .357 magnum revolver.

10. On or about January 24, 1997, in Alexandria, Virginia, after defendant DICKERSON and two unindicted co-conspirators robbed the First Virginia Bank and fled in DICKERSON's car, defendant DICKERSON kept the silver, semi-automatic .45 caliber handgun used in the robbery.

(All in violation of Title 18, United States Code, Section 371).

Count 2

(Bank Robbery/Aiding and Abetting)

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 18, 1996, in Alexandria, Virginia, in the Eastern District of Virginia, defendant CHARLES

THOMAS DICKERSON did unlawfully, knowingly, and by force, violence, and intimidation, take from the person and presence of another, specifically, bank teller Roanne Dwyer, approximately $4,660 in money belonging to and in the care, custody, and possession of a bank, specifically, NationsBank, 600 North Washington Street, Alexandria, Virginia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offense did assault and put in jeopardy the life of persons in the bank by use of a dangerous weapon, namely, a large caliber handgun.

(In violation of Title 18, United States Code, Sections 2113(a) and (d) and 2.)

Count 3

(Bank Robbery/Aiding and Abetting)

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 8, 1996, in Alexandria, Virginia, in the Eastern District of Virginia, defendant CHARLES THOMAS DICKERSON did unlawfully, knowingly, and by force, violence, and intimidation, take from the person and presence of another, specifically, bank teller Arintaye Uampornvanich, approximately $3,232 in money belonging to and in the care, custody, and possession of a bank, specifically, Central Fidelity Bank, 11 Canal Center Plaza, Alexandria, Virginia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offense did assault and put in jeopardy the life of persons in the bank by use of a dangerous weapon, namely, a .32 caliber, semi-automatic, black handgun.

(In violation of Title 18, United States Code, Sections 2113(a) and (d) and 2.)

Count 4

(Bank Robbery/Aiding and Abetting)

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 24, 1997, in Alexandria, Virginia, in the Eastern District of Virginia, defendant CHARLES THOMAS DICKERSON did unlawfully, knowingly, and by force, violence, and intimidation, take from the person and presence of another, specifically, bank teller Elsa O. Canda, approximately $876 in money belonging to and in the care, custody, and possession of a bank, specifically, First Virginia Bank, 300 South Washington Street, Alexandria, Virginia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offense did assault and put in jeopardy the life of persons in the bank by use of a dangerous weapon, namely, a silver, .45 caliber, semi-automatic handgun.

(In violation of Title 18, United States Code, Sections 2113(a) and (d) and 2.)

Count 5

(Use of a Firearm During Crime of Violence/
Aiding and Abetting)

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 18, 1996, in Alexandria, Virginia, in the Eastern District of Virginia, defendant CHARLES THOMAS DICKERSON, did knowingly and unlawfully use, and aid and abet the use of, a firearm, namely, a large caliber, semi-automatic handgun, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, specifically, the

crime of violence described in Count 2, which description is realleged and incorporated by reference in this Count.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

Count 6

(Use of a Firearm During Crime of Violence/
Aiding and Abetting)

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 8, 1996, in Alexandria, Virginia, in the Eastern District of Virginia, defendant CHARLES THOMAS DICKERSON, did knowingly and unlawfully use, and aid and abet the use of, a firearm, namely, a .32 caliber semi-automatic, black handgun, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States specifically, the crime of violence described in Count 3, which description is realleged and incorporated by reference in this Count.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

Count 7

(Use of a Firearm During Crime of Violence/
Aiding and Abetting)

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 24, 1997, in Alexandria, Virginia, in the Eastern District of Virginia, defendant CHARLES THOMAS DICKERSON, did knowingly and unlawfully use, and aid and abet the use of, a firearm, namely, a silver, .45 caliber, semi-automatic handgun, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, specifically, the

crime of violence described in Count 4, which description is realleged and incorporated by reference in this Count.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

A TRUE BILL:

FOREPERSON

Alexandria, Virginia
Date:

/s/ Helen F. Fahey
HELEN F. FAHEY
United States Attorney

/s/ Robert A. Spencer
KATHLEEN M. KAHOE
ROBERT A. SPENCER
Assistant United States Attorneys

EXCERPT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

[Caption Omitted in Printing]

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 11:30 a.m. on May 30, 1997.

BEFORE: The Honorable James C. Cacheris, Presiding Chief Judge, United States District Court

* * * *

[2] PROCEEDINGS

THE COURT: I'll go ahead and take up U.S. v. Dickerson.

MR. SPENCER: Good morning, Your Honor, Rob Spencer for the government.

MR. McCARTHY: Joe McCarthy for Mr. Dickerson, Your Honor.

THE COURT: Okay. It's on the Motion to Suppress. I will take that first.

Go ahead.

MR. SPENCER: We're prepared to call Special Agent Christopher Lawlor of the FBI, Your Honor.

THE COURT: Okay.

CHRISTOPHER LAWLOR, called as witness by the United States, being first duly sworn, testified as follows:

MR. SPENCER: Your Honor, if I might, I'd like to point out to the Court that in my written submission in

the factual summary it gets the timing of the Miranda warning wrong, which I realized last night talking to Agent Lawlor, but I think from the testimony it will all be clear. I don't think it's significant to the outcome of the suppression motion.

THE COURT: All right, sir.

DIRECT EXAMINATION

[3] BY MR. SPENCER:

Q Give the Court your name, please.
A Christopher Lawlor, L-a-w-l-o-r.
Q You're a special agent with the FBI?
A Yes, I am.
Q Are you the case agent in U.S. versus Charles Dickerson?
A Yes.
Q That case involves a series of bank robberies?
A Yes.
Q On January 24, 1997, was a bank robbed?
A Yes.
Q Where was it robbed?
A In Alexandria, Virginia.
THE COURT: What date was this, Agent Lawlor?
THE WITNESS: January 24, 1997.
THE COURT: Okay. And which bank was it?
THE WITNESS: First Virginia Bank at 300 South Washington Street, Alexandria.
THE COURT: Okay.

BY MR. SPENCER:

Q What, if anything, did witnesses see at the get-away from that robbery?
A Witnesses saw the bank robber get into a white Oldsmobile Sierra, and they got the license plate, the D.C. [4] license plate.

Q Did you trace that plate?
A Yes, I did.
Q To whom was it traced?
A Charles Dickerson.
Q Did you get a home address for Mr. Dickerson?
A Yes, I did.
Q Where was that?
A Tacoma Park, Maryland
Q Did you go to that home address?
A Yes.
Q When?
A On Monday, the 27th of January.
Q What time of day?
A It was late in the afternoon, around 7 o'clock.
THE COURT: What time?
THE WITNESS: About 7 o'clock.
THE COURT: At 7 p.m. you went on January 27th to his house.

BY MR. SPENCER:

Q Were you alone or were you with other agents?
A With other agents.
Q Was that car there, the 1985 Olds. With the plate you had run?
A Yes, it was. On recollection, I think it was [5] probably closer to 5:30 when I arrived in the area, but it may be some time later I knocked on the door.
Q Around dinner time?
A Around dinner time.
Q Did you knock on the door of the defendant's apartment?
A Yes.
Q Was he there?
A Yes, he was.
Q What did you say when you knocked on the door?
A I identified myself as an FBI agent.

Q Did an answer come from within the door?
A Yes.
Q What was the answer?
A I was asked to hold on first.
THE COURT: You were asked to hold on?
THE WITNESS: Hold on. First, he came to the door and said hold on, and then came back a short time later.
THE COURT: Let me ask, when he came to the door and asked you to hold on, was it just a voice through the door or was the door opened?
THE WITNESS: A voice through the door.
THE COURT: Okay.

BY MR. SPENCER:

Q What, if anything, did the defendant later tell you [6] he had with him when he answered the door that first time?
A A 45 caliber semi-automatic pistol.
Q What happened after you heard "hold on"?
A It sounded like the person on the inside went away for a brief time and then came back to the door, answered the door.
THE COURT: Excuse me a minute, Mr. Spencer.
MR. SPENCER: I'm sorry, Your Honor.
THE COURT: You knocked on the door. What is the response you get from the door?
THE WITNESS: Asked who is it. We identified ourselves, and then I was told to hold on.
THE COURT: When were you told he had a 45 caliber pistol?
THE WITNESS: Several hours later during the interview that evening.
THE COURT: Oh, okay. All right.
MR. SPENCER: Thank you, Your Honor.

BY MR. SPENCER:

Q At some point, was the door opened?
A Yes.
Q What, if anything, did you say at that point?
A I told Mr. Dickerson, again identified myself, and told him we were investigating a bank robbery, and asked if I could come in and talk with him.
[7] Q What did he say?
A He allowed us in.
Q Did you ask him to do something at that point?
A Yes. We then asked him to accompany us to the FBI office in Washington.
THE COURT: Do you want to talk a little slower and into the microphone? You're talking a little too fast for me. Go ahead.
The door is opened. You asked to talk to him about a bank robbery. When you go into his house, is there a hallway or what?
THE WITNESS: Actually it's an apartment that we went into. It's an apartment contained in a house. We entered the vestibule of what was originally I would suspect a house and then were let into an apartment.
THE COURT: Was the apartment on the same floor as when you came in or a different floor?
THE WITNESS: Same floor.
THE COURT: Back?
THE WITNESS: Front, as you walk in the front door, on the ground level, left, front left.
THE COURT: Just a short walk into the apartment?
THE WITNESS: Yes.
THE COURT: Took you back into the apartment?
THE WITNESS: Yes.
[8] THE COURT: All right.
Go ahead.

BY MR. SPENCER:

Q You were let into the vestibule of the apartment; is that correct?

A Yes, into the front room.

Q In there, you asked him to go down to the station with you?

A Yes.

Q What, if anything, did he say to you?

A He asked if he could get a coat.

Q What did you say in response?

A Yes.

Q Where was he going to get the coat?

A He was going to get the coat from a back bedroom.

Q Did he tell you where the coat was located?

A He said it was in the bedroom.

Q Ad [sic] what did you say after he said that?

A We asked if we can go with him.

Q And what was his response to that?

A That we could.

Q Then what happened?

A We went to the back bedroom. He got a coat from the bed. When he lifted the coat up, we saw the money underneath the coat.

[9] Q Let me step you back for one minute. Why did you say you had to go back to the bedroom?

A For our safety, to make sure there weren't any other people in the house and so that he wouldn't have any access to weapons.

Q Can you describe for the Court when you say the money was there, what did you see?

A I saw a large amount of money laying on the bed, on the sheet of the bed, after he lifted the coat.

Q Coins or bills?

A Bills.

THE COURT: The coat was just laying on the bed, and underneath it was the money?

THE WITNESS: Yes, sir.

THE COURT: It was January, so it was a cold day, I assume; is that right?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. SPENCER:

Q How much money did that prove to be?

A $552.

THE COURT: When did you know it was 552?

THE WITNESS: We counted it when we got back to the office.

THE COURT: You took it with you?

[10] THE WITNESS: He took it with him. He put it in his pocket. When we got back to the office, we took the money.

THE COURT: When you got back to the FBI office, you then counted it there; is that right?

THE WITNESS: Yes.

THE COURT: Okay, all right.

BY MR. SPENCER:

Q When you counted it back at the FBI office, was that before or after he was arrested?

A Before.

Q What, if anything, did he say about that $552 while you were in the bedroom?

A He said it was money he got from gambling when he was in Atlantic City.

Q What did he do with the money while you were still in the bedroom?

A He put it in his pocket.

Q When you were in the apartment, Agent Lawlor, did you ask the defendant whether you could search the apartment?

A Yes.

Q What was his response?
A That we could not.
Q Did he accompany you then to the FBI office?
[11] A Yes, he did.
Q That's the Washington field office?
A Yes.
Q Was he under arrest?
A No.
Q Could he have declined to come with you?
A Yes.
Q Was he free to go?
A Yes.
Q Was he in restraints?
A No.
Q What time of day did you and the defendant get to the office?
A Probably in the area of 7 o'clock or after.
Q What was done with the defendant when you got there?
A We put him in the interview room and sat down and interviewed him.
Q How many people were in the room besides the defendant?
A Two, myself and a detective from Alexandria.
Q Was he under arrest at that point?
A No.
Q Did you make any threats or promises to the defendant?
[12] A No.
Q Did anyone make any threats or promises to him?
A No.
Q Did you touch him in any way, or did anyone else touch him?
A No.
Q Did you ask him questions about that point?
A Yes.

Q What, if anything, did he say about where he was on January 24th?
A He admitted that he had come to Alexandria to the Old Town area at about 10 o'clock in the morning, that he was driving his white Oldsmobile Sierra and that he was with, that he went there for purposes of looking at a restaurant. After looking at the restaurant, he went to get a bagel and described an area where he parked that was consistent with close to the bank that was robbed.
Q At that point, what did you do, Agent Lawlor?
A After the interview there, I went back, I went to a separate area of the building and got a search warrant, telephonically.
Q Search warrant for what?
A For the residence in Tacoma Park.
Q For the defendant's apartment?
A Yes.
[13] Q You said you got it telephonically?
A Yes.
Q How did you do that?
A I contacted Judge Kenkel in Maryland and described the facts of the case as we had them.
Q I'd like to send up, Your Honor, with the marshal's assistance.
THE COURT: Why did you contact the magistrate judge in Maryland, because that's where he was living?
THE WITNESS: Yes.

BY MR. SPENCER:

Q Would you take a look at Government Exhibit Number 2, please, Agent Lawlor.
Do you recognize that document?
A Yes, I do.
Q Do you recognize it by your signature?
A Yes.

Q Could you tell the Court what that is, please?
A It's the search warrant for 8313 Garland Avenue, Apartment 3, Tacoma Park.
Q That's the defendant's apartment?
A Yes.
THE COURT: Any objection to it for purposes of this hearing?
MR. McCARTHY: No, Your Honor.
[14] THE COURT: It's in.

BY MR. SPENCER:

Q Attached to that face sheet, there's a transcript?
A Yes.
Q What's that transcript of?
A My conversation with Judge Kenkel.
Q Have you read that transcript?
A Yes.
Q Is that accurate and complete?
A Yes.
Q And the warrant was authorized, Agent Lawlor?
A Yes, it was.
Q On the front, face sheet of the warrant, there's a section about the items to be seized or searched for. Who wrote the information in that section?
A I did.
Q Did you decide what words to put in there or did someone else decide?
A No, someone else did.
Q Who was that?
A The judge.
Q What did you do after you got the warrant?
A I notified agents who were in the area that we had a warrant, and I went back and told Mr. Dickerson that we were about to search his apartment.
[15] Q What reaction did the defendant have?
A Pardon me?

Q What was the defendant's reaction when you told him there was a warrant to search his apartment?
A He then decided that he wanted to talk to me again.
Q At that point, did you read the defendant his rights?
A Yes, I did.
Q Why did you read him his rigths then?
A Because it was apparent that he wanted to add some additional information, and I thought at that point he may becoming [sic] a suspect in a bank robbery.
Q Could you take a look please at what's been marked as Government Exhibit Number 1 for identification?
Do you recognize that docment?
A Yes.
Q Does your signature appear on there?
A Yes.
Q Could you tell the Court what it is, please?
A It's the Interrogation and Advice of Rights form, or a copy of it, that was signed by Mr. Dickerson.
Q Is that your standard Advice of Rights form from the FBI?
A Yes.
Q Did you read that form to the defendant?
[16] A Yes.
Q What did the defendant say or do in response?
A He indicated that he understood his rights and that he waived them.
Q He signed that document?
A Yes, he did.
A What time did that occur, the reading and the signing?
A It was signed at 9:41 p.m.
Q What, if any, promises or threats were made to the defendant to get him to sign that document?
A None.
Q Anyone touch or harm the defendant?
A No.

Q How was the defendant acting when he was advised of his rights?

A Coherent.

Q Did he appear intoxicated?

A No.

Q Did he appear alert?

A Yes.

Q Appear to understand?

A Yes.

Q Did he ask for a lawyer?

A No.

[17] Q Did he indicate that he didn't want to answer your questions?

A No.

MR. SPENCER: Your Honor, I'd offer Government Exhibit Number 1.

THE COURT: Any objection?

MR. McCARTHY: No, sir.

MR. SPENCER: Thank you, Your Honor.

BY MR. SPENCER:

Q Then you proceeded to ask the defendant some questions, Agent Lawlor?

A Yes.

Q What, if anything, did he say about the bank robbery?

A He admitted that on the morning of the 24th he was in Old Town, that he was driving his white Oldsmobile and that he was with a person that he knew as Jimmy.

Q What, if anything, did he say about what might be found in his apartment?

A He said that we might find some dye-stained money and a gun in his apartment.

THE COURT: He said what about the gun, say again.

THE WITNESS: He said we might find some dye-stained money and a gun in his apartment. He described the gun and where we would find it.

[18] BY MR. SPENCER:

Q What, if anything, did he tell you about when he answered the door that evening when you first knocked on the door?

A That's when he told me that he had the gun in his hand when he came to the door.

Q Were there cars impounded on January 27th of this year?

A Yes.

Q What cars were those?

A Cars belonging to Mr. Dickerson, a 1982 Chevy Caprice and a 1985 white Oldsmobile Sierra.

Q You said those belonged to Mr. Dickerson?

A Yes.

Q What was done with those cars?

A They were towed to the FBI office and sealed and later a search warrant was obtained.

Q When was that search warrant obtained, approximately?

A March of '97.

Q Please take a look at Government Exhibit Number 3.

Do you recognize that document?

A Yes.

Q How do you recognize it?

A By my signature.

[19] Q Tell the Court what that is, please.

A It is the face sheets for the search warrants, two search warrants, one for the Caprice, and one for the Sierra and the accompanying affidavit.

Q You obtained those from the magistrate judge in the District of Colmbia?

A Yes.

Q And the search warrants were granted?

A Yes.

Q And agents searched the cars?

A Yes.

Q What, if anything, was found in the 1982 Chevy Caprice?

A Nothing of value.

Q Nothing relevant to this case?

A Correct.

Q What, if anything, was found in the 1985 Oldsmobile Sierra?

A A receipt for the rental of a U-Haul truck, receipt for auto glass repair, a black leather back pack, a disposable camera, cleaner solvent. Referred to as M-1 Solvent, some rubber gloves, a coat.

Q To your knowledge, what is M-1 cleaner used for?

A It's just a general all-purpose removal.

Q Does it have any relevance for bank robbery?

[20] A Mr. Dickerson said that that's what he used to take dye stain off of bills.

MR. SPENCER: That's all I have right now, Your Honor.

THE COURT: Okay.

Let me ask you this. Did you count the money before getting the warrant?

THE WITNESS: Count the money that—

THE COURT: You counted it as soon as you got down to the office; is that correct?

THE WITNESS: Certainly afterwards, yes.

THE COURT: That was before you got the warrant, obviously?

THE WITNESS: Yes.

THE COURT: Thank you.

Go ahead.

CROSS-EXAMINATION.

BY MR. McCARTHY:

Q There essentially were two conversations with Mr. Dickerson at the field office, one before the search warrant for the home, and then the second one when he changed his version of the story?

A Yes.

Q With regard to the second set of statements by the defendant, how long did that take?

[21] A The entire process?

Q The second conversation. How much time did he spend talking to you and giving you additional or different—

A Maybe an hour or so. I don't recall exactly.

Q During that hour of conversation, he told you you might find dye-stained money and a gun?

A Yes.

Q Did he say anything else during that hour?

A Yes.

Q What else did he say?

A He told us what he knew about Jimmy, a person that we later identified as James Rochester, that they had been arrested together before; he described where Jimmy lived, what Jimmy had told him about robbing banks, among other things.

Q When you were on the telephone with the magistrate judge in Maryland, you got telephonic approval, were there other agents assisting you that night?

A Yes.

Q Other agents actually went to the home then after the magistrate judge gives telephonic approval?

A Yes.

Q You stayed at the field office?

A Yes.

[22] Q With the defendant?

A Yes.

Q After you get off of the phone, how long is it before you go back to the defendant and advise him we do have telephonic approval now for the search of your home?

A Matter of minutes.

Q That's when you begin this hour conversation, that's when that hour conversation—

A Yes. Actually I think shortly thereafter. It wasn't instantaneous with telling him but shortly after, a couple of minutes.

Q You were in a different room, of course. You had come into the room where he was.

A Yes.

Q You then disclosed to him we've got the telephonic approval?

A Right.

Q Then he immediately says he wants to change his mind and give you some new information?

A He didn't say that immediately. It was several minutes later.

Q Several minutes, okay.

And the second conversation during which he gives this additional information was something that he did for you only after you Mirandize him?

[23] A Yes.

Q Now, you're sure about that?

A Yes.

Q Okay. The conversation you had with the magistrate judge about the search of the home, you indicated in the transcript that you had seen this money 500 and some dollars, and you explained to the magistrate judge the citizen got the tag number and you were able to trace the Olds to the defendant.

The fact of the matter is, when you are talking to the magistrate judge to get the approval for the search warrant, you know that the $552 is no longer in the home you're seeking permission to search; don't you?

A Yes.

Q As a matter of fact, it's in the room with you in his pocket, the defendant's pocket; correct?

A Yes.

Q The fact of the matter is, when you were briefly in the home a few hours earlier that night, you saw no other evidence incriminating the defendant besides that $552?

A There was nothing in plain view.

Q So the answer to my question is, yes, that's right, you didn't see anything else?

MR. SPENCER: Your Honor, he has answered the question.

[24] THE COURT: Okay.

BY MR. McCARTHY:

Q Whether it was in plain view or not, I'm not sure whether you might have seen other things. Did you see anything else, whether in plain view or not?

A I saw nothing that I recognized immediately from the bank robbery.

Q There was nothing you gave to the magistrate beyond the $552 that's part of the tape and transcribed conversation as what you saw in the apartment?

A Correct.

Q Did the magistrate voice any concern about what it exactly was you would be looking for in the apartment?

A I don't think he voiced any concern.

Q You say that it was the magistrate's suggestion, evidence of bank robbery?

A [sic] Was there any discussion on or off the record in discussions with the magistrate judge about exactly what it is particularly would be sought?

A No.

Q Was any part of the conversation you had with the magistrate judge not part of the transcript of the conversation?

A Very briefly, when I first contacted him before the tape recorder was turned on, I wanted to let him know that a [25] tape recorder was going to be turned on.

Q The fact of the matter is, when you went back, or when the other agents went back, you had no idea what, if anything, they would find based on what you had originally seen when you went to the apartment yourself to meet the defendant?

A I had no way of knowing what they would find.

Q What I mean to say is, there was nothing in particular you expected to find there on the second trip back to the aparament that night based on what you had seen the first time around?

A The search warrant was for evidence for the crime of bank robbery.

Q And when you entered the apartment, your guns weren't drawn; were they?

A Mine wasn't.

Q Yours wasn't. Well, how many other gentlemen or law enforcement officers were you with?

A I think a total of four came into the apartment.

Q Did anybody have a weapon drawn?

A I didn't see any. I was the first one in.

Q Usually it would be the first one who would have his weapon drawn if anybody was going to have it drawn, isn't it; isn't that true?

A I couldn't say that's true.

[26] Q You didn't expect your colleagues to have their weapons drawn?

A I didn't expect one way or the other.

Q You didn't feel that you needed to have your weapon drawn?

A I didn't have it drawn.

Q I know you didn't have it drawn. I'm asking you didn't feel you needed to have it drawn; did you?

A Immediately, no.

Q When Mr. Dickerson indicates he has to go get his coat before he leaves with you, how many agents follow him into the bedroom?

A Myself and a detective.

Q Two agents?

A Two people.

Q Two officers?

A Two officers.

Q How many rooms do you travel through from the entranceway to the apartment to the bedroom where his coat is found?

A I don't know how you would break down the rooms, but we went through one threshold, one doorway, kind of a common living room/dining room area, and then the bedroom if I remember.

Q Would it be a distance comparable to where I'm [27] standing from you, closer, further?

A A little bit further, maybe from here to the wall.

Q 30 feet, is that fair, to estimate?

A That would be fair.

Q You followed him into the bedroom?

A Yes.

Q The other agent did also?

A Officer.

Q Nobody asked for permission from him to follow him into the room. You just simply announced we're going to follow you?

A I said we need to, and he didn't protest.

Q The fact of the matter is, whether he protested or not, you would have followed him?

A That's not true.

Q If he had protested, you would not have followed?

A Correct.

Q He was free to leave at that time?

A Yes.

Q Now, in your conversation with the defendant in order to have him come to the field office with you, did you make any suggestions of consequences if he didn't cooperate or didn't accompany you?

A No.

Q Did anyone else? When I say you, I mean you [28] generically in terms of any law enforcement officer there.

A I didn't hear any.

Q Were you all present together at all times?

A No.

Q So other officers could have said things to him out of your hearing?

A I was with Mr. Dickerson, but I wasn't with all the officers at all times.

Q Were you with Mr. Dickerson at all times?

A Yes, until we got to the field office.

MR. McCARTHY: Okay.

Thank you. That's all I have of the gentleman.

THE COURT: Let me ask. Agent Lawlor, what did you take the phrase "Evidence of crimes of bank robberies" used in the warrant to mean? What did you consider that to be?

THE WITNESS: Generally money, guns, clothing, records.

THE COURT: Okay. Did you, in fact, specify to the magistrate what you were seeking? Did you tell him you wanted to get guns, money, evidence, clothing.

THE WITNESS: No.

THE COURT: You didn't specify?

THE WITNESS: I don't think I specifically listed out what we were searching for.

THE COURT: Did you know the serial numbers of the [29] bank, were marked or unmarked, or anything like that.

THE WITNESS: I don't recall. I'm trying to recall if that bank gave out bate money or not, but generally banks do give out bate money during bank robberies.

THE COURT: They also give out a dye pack in a separate—

THE WITNESS: Some banks do, some don't.

THE COURT: There was a dye pack in this case or not?

THE WITNESS: No, there was no dye pack in this case.

THE COURT: Okay.

Any other questions?

MR. SPENCER: I have a question.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. SPENCER:

Q How many bank robberies were you investigating at that point on January 27th?

A One.

Q During the course of the evening discussing things with Mr. Dickerson that night, did you become aware that he was allegedly involved in another bank robbery earlier in time than the January 24th?

A Yes.

[30] THE COURT: What bank was that? What bank was the other bank?

THE WITNESS: A bank in Maryland.

BY MR. SPENCER:

Q When was that?

A The bank robbery or when did I become aware of another bank robbery.

Q When did the bank robbery occur?
A I believe it was September of '96. I'm not sure.
Q Did you, in fact, recover any bate bills from the defendant's apartment?
A Yes.
Q To what bank robbery were those?
A A Maryland bank robbery.
Q The same one you just told us about or a different one?
A Same one.
MR. McCARTHY: If the Court please, I'd object to it as really not relevant to any of the issues, because it's not been relied on by any of the magistrate judges.
THE COURT: Sustained.
MR. SPENCER: Your Honor, I think to the extent you were talking about evidence he was seeking for, what evidence is evidence of crime of a bank robbery.
THE COURT: Go ahead. I'll allow it briefly.
[31] Go ahead.

BY MR. SPENCER:

Q You said you recovered a bate bill?
A Yes.
Q What bank robbery did that go to?
A Maryland bank robbery.
Q Did you recover dye-stained money?
A Yes.
Q Have you been investigating Mr. Dickerson for bank robbery or robberies that relate to a bank where a dye pack was taken?
A Yes.
Q How many bank robberies?
A At least seven that I know of now.
MR. SPENCER: That's all I have, Your Honor.

RECROSS EXAMINATION

BY MR. McCARTHY:

Q If the Court please, just one question.
None of that was communicated to the magistrate judge who authorized the search of the home in Tacoma Park, correct?
A Correct.
Q That was all discovered after the fact?
A Yes.
MR. McCARTHY: Thank you, Your Honor.
[32] THE COURT: You may step down, sir.

(Witness steps aside.)

THE COURT: Any other evidence the government wants to offer?
MR. SPENCER: No, Your Honor.
MR. McCARTHY: Put Mr. Dickerson on the stand, if the Court please.

(Defendant sworn.).

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. McCARTHY:

Q Would you please state your full name for His Honor.
A Charles Thomas Dickerson.
Q Mr. Dickerson, I want to draw your attention to the evening, approximately 5 to 7 p.m. on 27 January, that Monday when the agent testified he came to your home. You answered the door and allowed him into your home?
A No, I didn't.

Q Did you answer the door?
A Yes, I did.
Q When you answered the door, what happened?
A I told him hold up, that I need to put some pants on.
THE COURT: Speak into that microphone.
[33] What did you tell him?
THE WITNESS: I told him hold on, I had to put some pants on because I just got out of the tub.
MR. McCARTHY: All right.
THE WITNESS: That's when I left the door.
THE COURT: You said you had just gotten out of the tub?
THE WITNESS: Yes, I had to put some pants on.

BY MR. McCARTHY:

Q Was the door open when you said that?
A No.
Q After you put your trousers on, did you open the front door?
A Yes, I did.
Q What happened next?
A Opened the door, it was Agent Lawlor, another agent, and it was probably like at least 10 to 15 men within that door threshold right there, all with their guns drawn.
Q Did you say there were 10 to 15?
A Yes.
Q Did any of them come into your home?
A Yes, they did. I told them to hold up, I had to go hang my phone up, and I turned around and they was there behind me.
THE COURT: Take a little slower now.
[34] All of them came into your home?
THE WITNESS: No. Agent Lawlor, another agent, and I think one other one came in.

THE COURT: So three came in?
THE WITNESS: Yes.
THE COURT: Three agents came in.
THE WITNESS: That I saw.

BY MR. McCARTHY:

Q Did you invite them in?
A No, I didn't.
Q What did you tell them about coming into your home?
A I told them to hold up, I had to go hang my phone up because I was on the phone.
Q Where was your phone?
A My phone was in my bedroom.
Q How far is your bedroom from the front door of your apartment, using anything in this room?
A About from here to that wall, as Agent Lawlor stated.
Q About 30 feet?
A Yes.
Q Did you walk from your front door then that 30 feet to your bedroom?
A Yes.
Q Was your back turned to the agents?
[35] A Yes, it was.
Q Did you realize they were following you?
A No, I didn't.
Q When you got to your bedroom, did you discover them right behind you?
A Yes, I did.
Q Did they ever ask permission to follow you into your bedroom?
A No.
Q Did you want them to follow you into your bedroom?
A No, I didn't.

Q Did you want them in your home?

A No, I didn't.

Q Did they ever give you any indication that you protesting them coming into your home would do you any good?

A No.

Q What was the attitude they had inside your home in terms of them being there and not leaving, what did they communicate to you, if anything?

A It was more they came to ask me questions about a bank robbery. I mean, just, it's like we're here and we want to know what you know about it.

Q When you went into your bedroom, did you get your coat?

A Yes, I did.

[36] Q Did you feel you had a choice about going to the field office with them?

A Not really.

Q Why not?

A Because so many people. I asked the agent, I said, you all came to ask me questions, why did you bring so many people. He stated that it was another office close by, and all of them just came.

Q All right. When you went to the station, the officer described two different discussions you had. Let me direct your attention to the second discussion.

A Okay.

Q You had a chance to see the rights waiver Miranda form that I showed you while they were talking on direct, do you recognize that as something they showed you and had you sign?

A They didn't—no, not at first, they didn't show me that.

Q I'm not asking you when it was signed. I'm just asking do you recognize that's what they showed you, and that's what you signed; isn't it?

A Yes.

Q Was that at the end of the second discussion you had or was that before the beginning of the second discussion?

[37] A It was at the end of the second discussion.

Q Was that the last thing that was done during your meetings with them before you were arrested?

A Yes, it was.

Q Were you arrested that night?

A Yes, I was.

Q Did you know before you made any statements to any law enforcement officer that you did have a right to remain silent and you didn't have to talk to them?

A No.

Q Did you feel that you had a choice in talking with them?

A No, I didn't have a choice.

Q What was your reaction when the agent told you, we've got a search warrant for your home now and we're going to search?

A I said you can search as long as I'm there because I had been there for at least four hours by myself.

THE COURT: Excuse me one minute.

When they told you they had a search warrant, had you signed the Advice of Rights form yet?

THE WITNESS: No; no, I didn't.

THE COURT: You signed it after they told you they were going to search; is that right?

THE WITNESS: No; it's still some time after that, [38] Judge.

THE COURT: Long or after that.

THE WITNESS: It was at least a half hour after.

THE COURT: During that half-hour period. Did you make statements to them?

THE WITNESS: We was still talking about the bank robbery.

THE COURT: At First Virginia.
Did you mention Jimmy during that conversation?
THE WITNESS: No, I didn't.
THE COURT: Go ahead.

BY MR. McCARTHY:

Q From the time he told you I have a search warrant for your house now until the time he gave you the rights waiver form and went through it with you and had you sign it, that period between being told about the search warrant and signing the rights waiver form, is that the period of time during which you had that second conversation before signing the rights waiver?

A Yes.

MR. SPENCER: Your Honor, that's the question you just asked him, I believe. Counsel didn't like the answer he got.

THE COURT: I'll let him answer.

BY MR. McCARTHY:

[39] Q You can answer the question.

A Yes.

Q After you signed the rights waiver form, did you make any other statements about any bank robberies or Jimmy or anybody else?

A No.

MR. McCARTHY: Your Honor. that's all I have for the gentleman.

Thank you.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. SPENCER:

Q Good afternoon, Mr. Dickerson.

A Good afternoon.

Q Now, on January 27th, the FBI came to your apartment, correct?

A Surely did.

Q They knocked on the door?

A Yes.

Q They announced they were from the FBI?

A Yes.

Q You said hold on a minute?

A Yes.

Q At that point you had come to the door with a gun in your hand; hadn't you?

[40] A No, I did not.

Q Well, later that night you told the agents that when you said hold on a minute, you had come to the door with a gun in your hand?

A I did not say that.

MR. McCARTHY: I'd object to the relevance on the question.

THE COURT: It came in earlier. I'm going to overrule you.

Go ahead.

BY MR. SPENCER:

Q Later that night, you told the FBI when you said hold on a minute you had come to the door with a gun in your hand?

A No, I did not.

Q You never said that to the FBI?

A I don't recall saying that to the agent.

Q You don't recall or you never said it?

A I never said it.

Q Let me read to you what Agent Lawlor has written down about your conversation with him on that subject.

"Dickerson said that he came to the door when agents initially knocked at his door with a pistol in his hand.

Dickerson decided to hide the gun prior to opening the door for the agents."

[41] A I did not say that.

MR. McCARTHY: Your Honor, asked and answered.

BY MR. SPENCER:

Q Your testimony here today is that when Agent Lawlor wrote that down he was making it up?

MR. McCARTHY: Agumentative and asked and answered.

THE WITNESS: I guess so.

THE COURT: Did that happen or not happen?

THE WITNESS: It did not happen. I didn't have a gun in my hand.

BY MR. SPENCER:

Q You opened the door?

A Yes, I did.

Q And the FBI asked whether they could come in, correct?

A I don't think they did.

Q You said yes, you let them in the front door?

A No, I did not.

Q There were three agents who came in, you said?

A No. They were still in front of the front door. My door, it didn't shut all the way. I told them hold up, I had to hang my phone up. I never invited them in.

Q How many agents came in?

A To my knowledge, I think it was three that was in [42] the bedroom with me. I couldn't tell you who was in the living room.

Q They asked you to come down to the FBI field office and answer some questions about a bank robbery, right?

A No. They asked me did I know anything about a bank robbery.

Q They asked you to come down to the field office and answer some questions about a bank robbery; didn't they?

A Yes.

Q You said you would?

A Yes, I did.

Q You said you wanted to go get your coat?

A At that time they was already in the room, they was already asking those questions.

Q They said they were going to have to come back to the bedroom.

A No, they never said that. They was in the bedroom.

Q They never said anything to you about going down to the field office until they were all the way down to your bedroom; is that your testimony?

A Yes, it is.

Q You lifted the coat off the bed; didn't you?

A Yes, I did.

Q When you lifted it off the bed, lying on the bed was this pile of bills?

[43] A Yes, it was.

Q That was $552, right?

A Yes, it was

Q You said you won it gambling?

A Yes, I did.

Q You put it in your pocket?

A I counted it in front of the officers. Then I put it in my pocket.

Q You counted it out, $552, right there in your bedroom in front of them?

A Yes, I did, because it was five $100 bills, that's why it was so easy to count. It was two $1 bills, I can't remember.

THE COURT: Talk a little slower now

Go ahead.

THE WITNESS: It was five $100 bills; that's why I counted it. Because as soon as I lifted my coat up, all of them said, oh, where did you get this. I said I just won it at Atlantic City. That's when I counted the money, because like they tried, you know, try to charge me without even questioning me.

BY MR. SPENCER:

Q You counted it out right in front of them?
A Yes, I did.
Q Then you put it in your pocket?
[44] A Yes, I did.
Q And then you went with them down to the FBI field office?
A Yes, I did.
Q On the way out of the apartment, though, they asked you whether they could search your apartment?
A Yes, they did.
Q You refused.
A Yes, I did.
Q You said no?
A True.
Q You know you could decline to have your apartment searched; didn't you?
A Yes, I did.
Q You didn't want your apartment searched by them; did you?
A I have already answered that question.
Q You have to answer it again, Mr. Dickerson.
A Yes, I did.
Q You didn't want them to search the apartment; did you?

MR. McCARTHY: Asked and answered, Your Honor.

THE COURT: Sustained.

BY MR. SPENCER:

Q You went down to the FBI field office, didn't you, [45] Mr. Dickerson?
A Same question, yes.
Q You went down to the FBI field office; didn't you?
A Yes.
Q Then they asked you some questions about the bank robbery?
A Yes, they did.
Q About the bank robbery that occurred on January 24th in Alexandria?
A Okay, yes.
Q They didn't threaten you in any way?
A No.
Q They didn't touch you?
A No.
Q They didn't make you any promises?
A No, they didn't.
Q You admitted you were in Alexandria on the morning of January 24th?
A Yes, I did.
Q In your Oldsmobile Sierra, correct?
A Yes, I did.
Q With D.C. dealer plates.

MR. McCARTHY: Your Honor, object to the content of the statement. The content is not relevant. The question is whether the statement, whatever the content, was given [46] freely and voluntarily.

THE COURT: I think he is checking to see whether he refutes it.

Did you refute anything about the statement that Mr. Lawlor said that you made?

THE WITNESS: Not so far, not about going to the station, no.

THE COURT: Okay.

BY MR. SPENCER:

Q Then you lied about the reason you were down there in Alexandria that day.

A I did not.

MR. McCARTHY: If the Court please, whether he refutes it or not isn't even important. Whether it's truthful or not isn't important. The question today is whether or not the government conduct was permissible under the Constitution, not the truth or veracity of any statement.

THE COURT: Okay.

MR. SPENCER: Your Honor, he is up here testifying, directly contradicting what an FBI agent has said.

THE COURT: I think it does go to credibility, so I'm going to overrule the objection.

Go ahead.

MR. SPENCER: Thank you, Your Honor.

[47] BY MR. SPENCER:

Q You lied about the reason you were in Alexandria about January 24th; didn't you?

A No, I didn't.

Q You gave two different versions to the agent that night; didn't you?

A If that's the way you want to state it, but that's not the way I said it. I told him in the beginning that I was looking for a restaurant, I was still looking for a restaurant. I just didn't tell him who was in my car with me. I told him that I was in Alexandria looking for a restaurant.

Q The first time you gave the story, you told about meeting a man named Terrence down there; didn't you?

A Yes.

Q That was a lie; wasn't it?

A No. Terrence was down there.

Q Then the second time you talked about being down there with Jimmy?

A It's the same story.

Q The first time you told about looking for restaurant for someone name Sulky.

A Yes, Soaky.

Q That's a lie; isn't it?

A No, it's not.

[48] Q Then you told about giving Terrence a ride back to Maryland?

A Yes.

Q That's a lie; isn't it?

A No, it's not.

Q And then you told about going to a house, a girl named Missy, and that's not true; is it?

A No, that is true.

Q The first time you gave Agent Lawlor the story, you never said anything about Jimmy; did you?

A No, I didn't.

Q You were just leaving that out; weren't you?

A I didn't know I had an option to talk about him. We wasn't talking about Jimmy. We was talking about a bank robbery.

Q You said the second time that you thought Jimmy was the bank robber.

A That's when they showed me a picture of Jimmy. That's when I started that. Other than that, I didn't know why I was there. I though I had saw something, that's [sic] that's why I was there.

Q The second time you gave the story to Agent Lawlor, you said that you thought Jimmy might have robbed a bank that morning?

A Yes.

[49] Q That's something you didn't say the first time you gave the story; did you?

A Because the first time I gave the story, Jimmy was not in the story.

Q You didn't say it the first time you gave the story; did you?

A I repeat my statement just now.

Q You didn't say it the first time; did you?

A The first time I gave the story, Jimmy was not in the story.

Q Right. You left Jimmy out the first time; didn't you?

A Jimmy wasn't in the story. They didn't show me the picture of Jimmy.

Q Mr. Dickerson, you left him out the first time; didn't you?

A No.

Q Now, Mr. Dickerson, your rights form was read to you that night; wasn't it?

A Yes, it was.

Q And you signed it; didn't you?

A Yes, I did.

Q That advised you of all your rights?

A Yes, it did.

Q You agreed to talk to them. You waived your right [50] not to answer questions; didn't you?

A At what time?

Q That night. You signed that form; didn't you?

A I didn't sign the form until I was about to leave.

Q You signed the form that night; didn't you?

A Yes, I did.

Q They didn't threaten you or make you any promises to get you to sign that form; did they?

A Yes. they did threaten me.

THE COURT: You say they threatened you?

THE WITNESS: Yes.

THE COURT: When?

THE WITNESS: Not this officer but the other one. It was more of a forceful, why don't you go ahead and confess, confess. The judge will go easy on you, confess, that's all they kept saying to me. We know you did it, confess to it.

BY MR. SPENCER:

Q They didn't make you any promises; did they?

A No, they didn't.

Q You have been arrested before; haven't you?

A Yes, I have.

Q In fact, on September 27th of last year, you were arrested in Montgomery County, Maryland, for bank robbery.

THE COURT: Sustained as to the arrest. If it's [51] convictions, I will hear it, but not arrest.

MR. SPENCER: Your Honor, he claims he didn't know he had a right to decline to answer questions or he could have a lawyer present. One of the things that's relevant to that is whether he had ever been Mirandized before or whether he has been through the criminal justice system before. That is relevant to this understanding.

THE COURT: Was he convicted?

MR. SPENCER: He was not convicted.

THE COURT: Let me ask you. Was it thrown out for a motion to suppress or what, nol prossed or what?

MR. SPENCER: I believe it was nol prossed, Your Honor.

THE COURT: Do you know why?

MR. SPENCER: I do not.

THE COURT: You say he was Mirandized on that occasion?

MR. SPENCER: That's correct.

THE COURT: Let me ask, were you ever given Miranda rights before this case?

THE WITNESS: I can't recall, Judge. However, I did ask did I need a lawyer and they said I didn't because I wasn't under arrest.

BY MR. SPENCER:

Q You have had your rights read to you before [52] September 27, 1996; didn't you?

A I cannot recall.

Q After you signed the statement, it was after the agents had said to you that they had a search warrant for your apartment in Maryland, correct?

A No.

Q Let me get this straight. The agent told you they got a search warrant for your apartment in Maryland, correct?

A True.

Q And after that, after they told you that, you signed the rights waiver form, correct?

A After that, yes.

Q After that, you told them, oh, you might find a gun in the apartment?

A No, I did not.

Q You did not tell them that?

A No, I did not.

Q So, when Agent Lawlor put that in his report, that's another thing he is lying about?

A Agent Lawlor had a beeper. He had told me what he found in my apartment. He said, Mr. Dickerson, you have some money in your apartment. I said, yes, I have some $1 bills. He said what about a $20 bate bill? I said somebody owed me some money. I guess if that's what you found, I [53] guess that could be it. Then he said, well, I also found a 45 gun. I said, well, that was in my closet. It was already stated to me.

Q When Agent Lawlor writes in his report of this interview with you, "Dickerson said that when FBI agents searched his home, they would likely find dye-stained money and a silver colored 45 pistol." You never said that to Agent Lawlor?

A I said that after they had already told me.

Q In fact, that was true, that there was a silver colored 45 in your apartment and there was dye-stained money in your apartment?

MR. McCARTHY: Your Honor, objection to that.

THE COURT: What basis?

MR. McCARTHY: We're not here to test the truth or veracity of what the police say they found in the apartment.

THE COURT: All right.

MR. SPENCER: Your Honor, we are, though, here to impeach the truth and veracity of what this defendant—

THE COURT: I'll let him answer this, and then let's move along with it.

BY MR. SPENCER:

Q It was true, a silver colored 45 was in your apartment; wasn't it?

A Yes, it was.

[54] Q That was a gun you got from Jimmy Rochester; wasn't it?

MR. McCARTHY: Your Honor, I object to that.

THE COURT: Sustained as to that.

BY MR. SPENCER:

Q After you admitted these things to the police, that's when you were arrested; isn't that right?

A No.

Q When were you arrested that evening?

A I was arrested after I showed them where Jimmy Rochester lived at.

MR. SPENCER: That's all I have, Your Honor.

THE COURT: You may step down.

(Witness steps aside.)

[Filed July 11, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

[Caption Omitted in Printing]

DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the Defendant, Charles Dickerson, through his counsel, and moves this Honorable Court to suppress the testimony of James Rochester and exclude him as a witness in this case. As grounds in support thereof, the Defendant states as follows:

1. On July 1, 1997, the Honorable James C. Cacheris issued an Order together with a Memorandum Opinion granting in part and denying in part the Defendant's Motion to Suppress. The Court granted the motion as to the Defendant's statements offered at the FBI Field Office on January 27, 1997, and as to items discovered during a search of the Defendant's home that evening. The Court denied the motion as to the search of the Defendant's Oldsmobile Ciera on March 28, 1997.

2. The Court suppressed the Defendant's statement given at the FBI Field Office on the grounds that the Defendant was under arrest at the time he was removed from his home by armed FBI agents and driven to the Field Office, and that, once at the Field Office, the Defendant was not properly advised of his *Miranda* rights until after he had completed his statement to the agents.

3. The arrest of Mr. Dickerson on the evening of January 27, 1997, was in violation of Mr. Dickerson's Fourth

Amendment rights because it was not supported by probable cause. During this unconstitutional seizure of his person, Mr. Dickerson gave the aforementioned statement. Prior to obtaining this statement, the Government did not know the identity or whereabouts of James Rochester.

4. Any and all information obtained by the Government from James Rochester was tainted by the Government's unlawful arrest of Mr. Dickerson. Without Mr. Dickerson's statement, the Government never could have located James Rochester or developed him as a witness against Mr. Dickerson. James Rochester's admissions to the police incriminating Mr. Dickerson in the bank robberies and related charges pending before this Court are tainted by the unlawful arrest of Mr. Dickerson and should be excluded as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

WHEREFORE, the Defendant requests that this Honorable Court suppress the testimony of James Rochester and exclude him as a witness in this case.

Respectfully submitted,

CHARLES THOMAS DICKERSON
By Counsel

/s/ James W. Hundley
JAMES W. HUNDLEY
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court articulated the "fruit of the poisonous tree" doctrine. According to *Wong Sun*, derivative evidence, such as physical evidence, a confession, or *the testimony of a witness*, must be suppressed if it was discovered by exploiting a search or seizure violative of the Fourth Amendment. The "tainted fruits" analysis applies when a defendant's constitutional rights have been infringed. *See Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

In the recent case of *United States v. Elie*, —— F.3d ——, (4th Cir. April 24, 1997), the Fourth Circuit ruled that the poisonous fruits doctrine did not apply to derivative evidence discovered as a result of statements taken in violation of *Miranda*. However, the Court continued its adherence to the rule that evidence discovered as a result of a constitutional violation is tainted and inadmissible.

In the case at bar, the FBI violated Mr. Dickerson's right to be free from unlawful seizure when they arrested him at his home without probable cause to believe he had committed a crime. Indeed, the position of the Government at the initial suppression hearing was that they did

not intend to arrest Mr. Dickerson. Rather, they only wished for him to consensually accompany them to the FBI Field Office and voluntarily answer questions concerning the bank robbery they were investigating. The Government took this position because at the time the FBI first confronted Mr. Dickerson at his home, it was clear they did not have probable cause to arrest him. The only information they had was that Mr. Dickerson's automobile had been seen in the vicinity of a bank robbery. They had no evidence placing Mr. Dickerson at the scene of the crime or linking him to the robbery in any way.

The Court has already ruled that the FBI arrested Mr. Dickerson when they took him from his home and drove him to the FBI Field Office. This arrest was unconstitutional. During the course of this unlawful seizure, Mr. Dickerson gave the police an unmirandized statement in which James Rochester was identified for the first time. Mr. Dickerson told the agents James Rochester's name and where he resided. Prior to obtaining this statement, the FBI did not have any other evidence which could have led them to James Rochester.

Not only was this statement obtained in violation of *Miranda*, it was tainted by the unconstitutional nature of Mr. Dickerson's arrest. The FBI used Mr. Dickerson's unlawful arrest in a manner that led them directly to James Rochester. No source independent of Mr. Dickerson identified James Rochester as a witness in this case. But for the unlawful arrest of Mr. Dickerson, the FBI would not have located James Rochester. He became a witness only through the unattenuated exploitation of Mr. Dickerson's unconstitutional arrest.[1]

---

1 Courth have recognized three limitations to the "fruit of the poisonous tree" doctrine: (1) evidence attributed to an independent source; (2) evidence where the connection has become so attenuated as to dissipate the taint; and (3) evidence which inevitably would have been gained even with the unlawful action. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Nix v. Williams*, 467 U.S. 431, 448 (1984); Annot., "Evidence—Fruit of Poisonous Tree," 43 A.L.R.3d 385, 398-406, §§ 6-9 (1972). None of the limitations are applicable to this case.

Accordingly, any testimony presented against Mr. Dickerson by James Rochester is the tained fruit of Mr. Dickerson's unlawful arrest. James Rochester should, therefore, be excluded as a witness in this case.

Respectfully submitted,

CHARLES THOMAS DICKERSON
By Counsel

/s/ James W. Hundley
JAMES W. HUNDLEY
BRIGLIA & HUNDLEY, P.C.

[Certificate of Service Omitted]

[Filed July 11, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

[Caption Omitted in Printing]

DEFENDANT'S MOTION TO RECONSIDER

COMES NOW the Defendant, Charles Dickerson, through his counsel, and moves this Honorable Court to reconsider that portion of its Order denying the Defendant's Motion to Suppress that pertains to evidence found during a search of the Defendant's automobile. As grounds in support thereof, the Defendant states as follows:

1. On July 1, 1997, the Honorable James C. Cacheris issued an Order together with a Memorandum Opinion granting in part and denying in part the Defendant's Motion to Suppress. The Court granted the motion as to the Defendant's statements offered at the FBI Field Office on January 27, 1997, and as to items discovered during a search of the Defendant's home that evening. The Court denied the motion as to the search of the Defendant s Oldsmobile Ciera on March 28, 1997.

2. The Court declined to suppress the evidence in the Ciera on the grounds that probable cause existed to search based on admissions of James Rochester and testimony from witnesses who identified the car.

3. The Court suppressed the Defendant's statement given at the FBI Field Office on the grounds that the Defendant was under arrest at the time he was removed from his home by armed FBI agents and driven to the

Field Office, and that, once at the Field Office, the Defendant was not properly advised of his *Miranda* rights until after he had completed his statement to the agents.

4. The arrest of Mr. Dickerson on the evening of January 27, 1997, was in violation of Mr. Dickerson's Fourth Amendment rights because it was not supported by probable cause. During this unconstitutional seizure of his person, Mr. Dickerson gave the aforementioned statement. Prior to obtaining this statement, the Government did not know the identity or whereabouts of James Rochester.

5. Any and all information obtained by the Government from James Rochester was tainted by the Government's unlawful arrest of Mr. Dickerson. Without Mr. Dickerson's statement, the Government never could have obtained the information from James Rochester needed to establish probable cause to search the Ciera. James Rochester's statements regarding the contents of the Ciera are therefore "fruit of the poisonous tree."

6. Likewise, all evidence seized during the search of the Ciera is tainted by Mr. Dickerson's unlawful arrest. It too is fruit of the poisonous tree and should be suppressed. *Wong Sun v. United States,* 371 U.S. 471 (1963).

WHEREFORE, the Defendant requests that this Honorable Court reconsider its ruling and grant the Defendant's Motion to Suppress evidence obtained from the search of the Oldsmobile Ciera.

Respectfully submitted,

CHARLES THOMAS DICKERSON
By Counsel

/s/ James W. Hundley
JAMES W. HUNDLEY
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO RECONSIDER

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court articulated the "fruit of the poisonous tree" doctrine. According to *Wong Sun*, derivative evidence, such as physical evidence, a confession, or the testimony of a witness, must be suppressed if it was discovered by exploiting a search or seizure violative of the Fourth Amendment. The "tainted fruits" analysis applies when a defendant's constitutional rights have been infringed. *See Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

In the recent case of *United States v. Elie*, — F.3d —, (4th Cir. April 24, 1997), the Fourth Circuit ruled that the poisonous fruits doctrine did not apply to derivative evidence discovered as a result of statements taken in violation of *Miranda*. However, the Court continued its adherence to the rule that evidence discovered as a result of a constitutional violation is tainted and inadmissible.

In the case at bar, the FBI violated Mr. Dickerson's right to be free from unlawful seizure when they arrested him at his home without probable cause to believe he had committed a crime. Indeed, the position of the Government at the initial suppression hearing was that they did not intend to arrest Mr. Dickerson. Rather, they only wished for him to consensually accompany them to

the FBI Field Office and voluntarily answer questions concerning the bank robbery they were investigating. The Government took this position because at the time the FBI first confronted Mr. Dickerson at his home, it was clear they did not have probable cause to arrest him. The only information they had was that Mr. Dickerson's automobile had been seen in the vicinity of a bank robbery. They had no evidence placing Mr. Dickerson at the scene of the crime or linking him to the robbery in any way.

The Court has already ruled that the FBI arrested Mr. Dickerson when they took him from his home and drove him to the FBI Field Office. This arrest was unconstitutional. During the course of his unlawful seizure, Mr. Dickerson gave the police an unmirandized statement in which James Rochester was identified for the first time. Mr. Dickerson told the agents James Rochester's name and where he resided. Prior to obtaining this statement, the FBI did not have any other evidence which could have led them to James Rochester.

Not only was this statement obtained in violation of *Miranda*, it was tainted by the unconstitutional nature of Mr. Dickerson's arrest. The FBI used Mr. Dickerson's unlawful arrest in a manner that led them directly to James Rochester. No source independent of Mr. Dickerson identified James Rochester as a witness in this case. But for the unlawful arrest of Mr. Dickerson, the FBI would not have located James Rochester. He became a witness only through the unattenuated exploitation of Mr. Dickerson's unconstitutional arrest.[1]

---

1 Courts have recognized three limitations to the "fruit of the poisonous tree" doctrine: (1) evidence attributed to an independent source; (2) evidence where the connection has become so attenuated as to dissipate the taint; and (3) evidence which inevitably would have been gained even with the unlawful action. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Nix v. Williams*, 467 U.S. 431, 448 (1984); Annot., "Evidence—Fruit of Poisonous Tree," 43 A.L.R.3d 385, 398-406, §§ 6-9 (1972). None of the limitations are applicable to this case.

After locating James Rochester, the Government obtained admissions from him that evidence from the bank robbery was in Mr. Dickerson's Oldsmobile Ciera. This statement is tainted and, like Mr. Dickerson's own statement, cannot be used to support the search of the Ciera. Without this evidence, the Government is left only with the statements of witnesses obtained on the day of the robbery. The Ciera was confiscated by the FBI three days after the robbery. The witness statements are therefore too stale and unparticularized to provide probable cause to search the automobile.

In conclusion, the Government lacked sufficient, constitutionally obtained evidence to support the execution of the search warrant for the Ciera. Any evidence found as a result of this search should, therefore, be suppressed.

Respectfully submitted,

CHARLES THOMAS DICKERSON
By Counsel

/s/ James W. Hundley
JAMES W. HUNDLEY
BRIGLIA & HUNDLEY, P.C.

[Certificate of Service Omitted]

[Filed July 15, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Caption Omitted in Printing]

GOVERNMENT'S MOTION FOR RECONSIDERATION

The United States moves for reconsideration of the Court's Memorandum Opinion and Order filed July 1, 1997. At the outset, we recognize that the Court disfavors motions for reconsideration. This motion, however, is unique because, putting the merits aside, the Court's Opinion expressly accuses an FBI Agent of giving untrue testimony—a grave accusation that, with all respect, we believe is unsupported by the extant record and that certainly is contradicted by the newly presented evidence attached to this pleading. At stake here is not only our ability to bring Dickerson to book for multiple armed robberies, but also quite possibly an agent's career.

We ask the Court to reverse its decision suppressing Dickerson's statements and the evidence seized in the search of his apartment. The suppressed evidence implicates Dickerson in multiple bank robberies and an armed car-jacking during which a gun was taken that later was used to murder an off-duty correctional officer. As the attached affidavit of FBI Agent Lawrence Wenko reflects, the experienced agent in charge of executing the search knew exactly what to look for, conducted a reasonably limited search, and seized only evidence of the type specified in the warrant, namely, evidence of bank robbery.[1] Even if the warrant lacked particularity, there is no reason to doubt that the agents conducted the search in good-faith reliance on the warrant's validity.

Likewise, the record supplemented by the attached affidavits shows that Dickerson was not in custody for *Miranda* purposes and that his incriminating statements were elicited after he was given *Miranda* warnings. At all events, since there is no evidence or even serious allegation that Dickerson's statements were involuntary, the statements are admissible under 18 U.S.C. 3501(a), which provides that "in any criminal prosecution brought by the United States . . . a confession *shall be admissible* if it is voluntarily given" (emphasis added).

We also ask the Court to reconsider and modify its comments accusing FBI Agent Christopher Lawlor of giving untruthful testimony. As the Court is aware, judicial findings that an FBI agent has given untruthful testimony have very serious consequences, including preventing the agent from being an effective witness in future cases. That in turn could have adverse consequences for his career, and trigger DOJ and FBI Office of Professional Responsibility investigations. Accordingly, such accusations should be made only when grounded in the most compelling evidence. As we show below, there is no such evidence here, nor, indeed, any persuasive reason to conclude that Agent Lawlor was untruthful either in his testimony at the suppression hearing or in his representations to the magistrate judge.

A. Agent Lawlor's Truthfulness

The Court's Opinion questioned Agent Lawlor's truthfulness on several specific issues. First, the Court stated

---

[1] A small quantity of drugs, which was in plain view, was also seized.

that "[t]here is nothing in the transcript of the telephonic application for the warrant to support Agent Lawlor's sworn testimony" that the magistrate judge "decided" what to write on the face of the warrant "about the items to be seized or searched for." The application transcript shows that the magistrate judge instructed Lawlor on what to write in virtually every section of the warrant. After Lawlor recounted the facts establishing probable cause, the magistrate stated:

> I'm convinced both of the, the need and exigency for the, ah, search warrant on this oral testimony, that there is probable cause to believe at that residence there may be, ah, evidence of, of the bank robbery in question. So sign the, ah, search warrant and, ah, the date is, ah, January 27, 1997, and, if you would, write that in on your form too and the time we'll use is 8:50 . . .

Although these instructions are not entirely clear, they are reasonably construed as Agent Lawlor recalled them at the hearing, that is, as directing him to write on the warrant "evidence of the crime of bank robbery." This is particularly true since, as noted, Lawlor followed the magistrate's specific directions in completing the other sections of the warrant. Beyond this, since as Lawlor well knew, the transcript of the warrant application was available to the Court, Lawlor would have had nothing to gain (and much to lose) by deliberately misrepresenting his conversation with the magistrate.

Second, the Court conclded (Mem.Op.n.3) that Agent Lawlor "was not credible" in testifying at the hearing, and in the telephonic warrant application, that Dickerson was not under arrest and therefore free to go until after execution of the search. The Court reasoned: "It strains credibility to believe that the FBI would simply release a

person who (1) owns a car used in a bank robbery; (2) admits that he was in the vicinity of the robbery in question at the time it was committed; (3) admits that a passenger in his car engaged in behavior that witnesses attribute to the robber[2]; (4) is subsequently discovered with a large sum of cash; and (5) who agents "believe . . . could destroy evidence" of the robbery."

The information the agents possessed prior to the search provided probable cause for the search and may also have amounted to sufficient cause for Dickerson's arrest; but that falls short of establishing that Agent Lawlor was untruthful in representing that Dickerson was not going to be arrested unless more evidence turned up. Agents commonly delay arresting a suspect for investigative reasons until after they obtain enough evidence to prove guilt beyond a reasonable doubt. In fact, it is not unusual for prosecutors to recommend that practice during investigations. See *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (recognizing that investigators and prosecutors have discretion to delay arrests even after they have probable cause); Cf. *United States v. Lovasco*, 431 U.S. 783 (1977) (the government is not required to indict as soon as it obtains probable cause, and there may be good reason to delay indicting until more conclusive evidence is obtained).

Here, assuming *arguendo* that the agents had probable cause to arrest Dickerson *before* the search, there is no reason to conclude that Agent Lawlor was untruthful when he testified that the agents did not intend to effect an arrest at that point. The attached affidavits of FBI Agent Wenko and Alexandria Detective Durkin directly corroborate Lawlor. Thus, Agent Wenko avers:

---

[2] Dickerson did not make this admission until after the warrant was approved. See Suppression Hearing Tr. 12, 45, 48; Government's Second Supplemental pleading, p.3.

> My understanding on January 27, 1997, was that Dickerson would not be arrested unless he confessed or some evidence implicating him in a bank robbery was found in his apartment. I understand that once I found the bait bill in his apartment, there was enough evidence to arrest Charles Dickerson. In my experience, it is common for agents on my squad to ask a suspect in a violent crime to come to the FBI office to be interviewed and then let that suspect go after the interview. This is true even where we believe that the suspect is responsible for the crime, and even where we may have probable cause for an arrest but not a strong enough case to bring to trial.[3]

Wenko Affd. ¶ 14.

Detective Durkin states:

> After Agent Lawlor was informed about the bait bill found in Dickerson's apartment and after Dickerson made the admissions, he was told he would be charged with bank robbery. Before we learned of the bait bill, we were not going to arrest Dickerson and he would have been allowed to leave the FBI office. As we had told him, and I typically do, I or another officer would have given Dickerson a ride home if he had asked for one.

Durkin Affd. ¶ 13.

Third, the Court concluded that Agent Lawlor was not credible in testifying that Dickerson was given *Miranda* warnings *before* making the incriminating statements in issue; the Court elected to believe Dickerson's contrary

---

3 Agent Wenko's affidavit also sets out three situations where suspects in armed bank robberies were interviewed but not arrested. *Id.* ¶ 15. In the instant case, until after the search turned up evidence of bank robbery, the agents did not believe their case against Dickerson was strong enough to bring to trial.

testimony. However, Detective Durkin, who was with Dickerson in the FBI interview room "the entire time," states unequivocally: "I am sure that Dickerson was read his Miranda rights before he made th[e] statements" in issue. Durkin Affd. ¶ 12. Moreover, Durkin notes that Dickerson prepared a written statement in his own hand (attached to Durkin's affidavit) in which he admittedly was "read [his] rights" after he had been with the agents a couple of hours but *before* he made the incriminating statements.[4] We think this is compelling new evidence that strongly favors reconsideration of this issue both to achieve the just result in the case and to avoid the unwarranted tarnishing of Agent Lawlor.

Agent Lawlor, Detective Durkin, and Dickerson's written statement all establish that Dickerson was given his rights prior to making the incriminating statements. The fact that Agent Lawlor's hearing testimony about the precise time Dickerson was advised of his rights ("minutes" after the warrant was authorized) seemed to conflict with the time stated on the advice of rights form—a discrepancy on which the Court heavily relied—does not contradict the direct proof concerning the crucial fact, that is, that Dickerson was given his warnings *before* he made the incriminating statements. At worst, Agent Lawlor was simply mistaken about the time that transpired between getting the warrant (about 8:50 p.m.) and giving Dickerson his rights (9:41 p.m.). Lawlor certainly would have had no motive to lie about that matter since the only relevant issue was not clock-time but sequence, *i.e.*, whether Dickerson was *Mirandized* before his statements, and since (as the Court itself noted) the time between the

---

4 Dickerson's written statement indicated that he was given his rights at 7:30 p.m.—a time hours before the warrant was approved. Detective Durkin's affidavit states that Dickerson was simply wrong about the time. Dickerson was given his warnings after the warrant was approved, but *before* his incriminating statements.

warrant approval and the advice of rights waiver was indicated on the face of the documents.

Finally, the Court concluded that Agent Lawlor was not credible in testifying that he "didn't expect one way or the other" whether his colleagues would have their weapons drawn when they knocked on Dickerson's door. With all respect, we do not think the Court is familiar with the practices followed by FBI agents in such circumstances. Agent Lawlor's testimony was consistent with what those *ad hoc* practices are.[5] As FBI Agent Wenko states in his affidavit, "In my experience, agents sometimes draw their weapons and sometimes do not draw their weapons in situations like this." ¶ 4. With respect to the incident in question, Agent Wenko states: "Before knocking on Dickerson's door, we had no discussions about whether to draw our weapons, and I had no expectations that the other agents would or would not have their weapons drawn . . . I took up a station at the rear of the apartment, and I drew my weapon out of my holster, but I kept it down next to the holster, near my hip, pointed at the ground." *Id.*

Beyond this, Agent Lawlor's testimony about his *expectations* about the drawing of weapons was completely immaterial to the suppression issues before the Court. There was no question that the agents were armed and Lawlor did not testify that guns were not actually drawn.[6]

---

5 Whether an *ad hoc* approach is prudent or even safe is not the question. Judges or even prosecutors might think different procedures would be wiser. The question here is whether Agent Lawlor's testimony reflects the approach that actually exists, and is therefore more credible than the Court viewed it as being. We note in passing, however, that the issue may not be as clear-cut as it might seem at first blush. Each situation, each suspect and each site is bound to differ in ways that do not lend themselves to a one-size-fits-all "procedure".

6 The Court's Opinion stated that its assessment of witness credibility was partly based on demeanor. In 1996, Agent Lawlor suffered a broken neck playing hockey and is unable to turn his head. This accounts for his seemingly stiff and uneasy posture when testifying.

B. Dickerson's Statements Are Admissible

The Court found that Dickerson was in custody for *Miranda* purposes and that he was not advised of his rights until after he gave the incriminating statements in issue. We agree with the Court's statements of the applicable principles (as set out by the Fourth Circuit in the *Howard*[7] case) governing the custody determination, but disagree that Dickerson's "freedom of movement was restricted as if he had been arrested." The hearing record reflects that Dickerson agreed to accompany the agents to the FBI office and that he was not handcuffed in the car or at the office. The Court's Opinion emphasized that Dickerson "was not told that he was free to go," and that the choice Dickerson confronted was to "either stay in the warmth and light of the FBI field office or to be cast off into the dark and danger of the Washington night." Detective Durkin's affidavit shows this was simply not the case at all. Durkin states: "In the interview room, Dickerson was told that he was not under arrest, *that he was free to go, and he was told that he would be given a ride home.*" ¶ 8 (emphasis added). Agent Wenko's affidavit likewise states: "It is my practice, and that of others on my squad, including SA Lawlor, when finished with an interview, to give the suspect a ride back to his residence, or call him a cab if he prefers, or allow him to wait for someone to pick him up." ¶ 14.

But, even if the Court adheres to its view that Dickerson was in custody for *Miranda* purposes, the Court should reconsider its holding that he was not given his rights until after he made the incriminating statements in issue.

---

7 *United States v. Howard*, 1997 WL 318068 (4th Cir. June 13, 1997).

As set out earlier in our discussion of Agent Lawlor's credibility, Lawlor's testimony, Detective Durkin's affidavit, and Dickerson's own written statement show that Dickerson was advised of his *Miranda* rights *before* he made the statements.

At all events, even if *Miranda* warnings were required and not timely given, suppression cannot automatically be imposed. To the contrary, Congress has declared that where, as here, the statement was voluntary, it is to be admitted. To supersede the prophylactic rules promulgated in the *Miranda* decision [8] and to restore the traditional vouluntariness standard for the admission of statements made during custodial interrogation, Congress enacted 18 U.S.C. 3501. Section 3501 provides that "in any criminal prosecution brought by the United States . . . a confession *shall be admissible* in evidence if it is voluntarily given" (emphasis added). Section 3501(b) directs the trial court to consider "all the circumstances surrounding the giving of the confession" in deciding on its admission, including a number of enumerated factors, such as the defendant's receipt or awareness of the type of information conveyed in *Miranda* warnings. These factors, however, are only to be considered as evidence "in determining the issue of voluntariness," and the statute states expressly that "[t]he presence or absence of any of the . . . factors . . . need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. 3501(b). As the legislative history of Section 3501 explains, under subsection (b) "the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically numerated factors which historically

[8] See *Michigan v. Tucker*, 417 U.S. 433, 443-44, 446 (1974) (describing *Miranda* rules as not constitutionally required but only "prophylactic standards"); *Withrow v. Williams*, 113 S. Ct. 1745, 1752-53 (1993) (collecting numerous cases describing *Miranda* rights as "prophylactic in nature").

enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137. In other words, the significance of the factors enumerated in subsection (b) under the statute is simply the same as their significance in traditional voluntariness case law. *Cf., e.g., Crooker v. California*, 357 U.S. 433, 438 (1958).

Although Dickerson's suppression motion pleadings alluded to his Fifth Amendment rights, he relied principally on the argument that his statements should be suppressed because they allegedly were not preceded by *Miranda* warnings. He argued that the facts showed custodial interrogation, but did not even contend that his statements were coerced. Indeed, any effort along those lines would fail. See, *e.g., United States v. Braxton*, 112 F.3d 777, 784 (4th Cir. 1997) (*en banc*); *United States v. Elie*, 111 F. 3d 1135, 1143 (4th Cir. 1997). There is absolutely nothing in the record suggesting that Dickerson's "will was overborne," *Elie, id.* Moreover, Detective Durkin states that Dickerson was told that he was free to go and would be given a ride home; that, during the approximately four hours between the time he left his apartment and admitted he was with Jimmy Rochester in Alexandria on the day of the robbery, he was offered soda and was allowed to use the bathroom; that "Dickerson was never touched or threatened or promised anything to induce him to talk"; and that he appeared to "understand what was going on and to communicate effectively." Durkin Affd. ¶s 8, 13-15.

As the Fourth Circuit noted in *Elie*: "Because a defendant must demonstrate that the police activity used to elicit the incriminating statement was coercive, it is not surprising . . . that 'very few incriminating statements,

custodial or otherwise, are held to be involuntary.' " (citation omitted). Since this case is no exception, Dickerson's statements are admissible under Section 3501.

C. The Fruits of the Warrant-Authorized Search Are Admissible

The Court suppressed the fruits of the search of Dickerson's apartment ruling that the warrant was insufficiently particular in describing the items to be seized, and that the good faith exception to the exclusionary rule was inapplicable because "[t]he officers executing the warrant acted in bad faith." We believe the warrant was sufficiently particular, although by no great margin. *See United States v. Fawole*, 785 F. 2d 1141, 1144 (4th Cir. 1986) ("The warrant confines the executing officers' discretion by allowing them to seize only evidence of a particular crime. Consequently, we find that the warrant describes the items to be seized with sufficient particularity to satisfy the Fourth Amendment."); *United States v. Anthony*, No. 92-5258 (4th Cir. August 8, 1993) (unpublished) 1993 WL 321595. In addition, on this issue, we rely on our original pleadings (particularly Government's Second Supplemental pleading, pp. 14-17). We believe the cases we cited are consistent with the principle that

> [t]he test for the necessary particularity is a pragmatic one. The degree of specificity required may necessarily vary according to the circumstances and type of items involved . . . There is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of the items to be seized.

United States v. Torch, 609 F. 2d 1088, 1090 (4th Cir.), cert. denied, 446 U.S. 957 (1979) (citations omitted).

As a practical matter, the instant warrant did not authorize an improper general search because "evidence of the crime of bank robbery" generally includes a distinct, readily identifiable class of items, as in *Fawole*. As reflected in Agent Wenko's affidavit, experienced FBI agents investigating bank robbery know exactly what to search for: "guns, money, bait bills, dye-stained money and dye-stained objects, burned money, clothing, shoes, disguises, carrying bags, gloves." Wenko Affd. ¶ 8.

This also distinguishes a case like this from those involving investigations of more complex, general, or document related offenses. For example, as Professor LaFave points out, "[s]earch warrants for documents are generally deserving of somewhat closer scrutiny with respect to the particularity requirement because of the potential they carry for a very serious intrusion into personal privacy." W. LaFave, *Search and Seizure*, § 4.6(d) p. 569 (3d ed. 1996).

Even if the Court adheres to its view that the warrant was not sufficiently particular, we believe it should reconsider its holding that the warrant was so facially deficient as to preclude reasonable reliance on it. As the Fourth Circuit recently explained, "[a] warrant that fails to particularize the place to be searched or the items to be seized is so facially deficient that it precludes reasonable reliance *only* when '[o]fficers poised to conduct a search [would] be able to ascertain that [it] fails to offer sufficiently detailed instruction and instead leaves them guessing as to their task,' " *United States v. Ruhe*, 1997 WL 269339 (4th Cir. May 22, 1997) (unpublished) (emphasis added). *Ruhe* suggests that the standard for assessing the objective reasonableness of reliance on the warrant is whether it gave the searching officers "any guidance whatsoever as to the subject of the search," tak-

ing care to consider as well "the knowledge of the searching officers."

Although the warrant certainly could have been more particular, one could not say that it failed to provide "any guidance whatsoever as to the subject of the search." The warrant authorized a search for "evidence of the crime of bank robbery"—a distinct category of evidence such as guns, bait money, disguises and the like, that would easily be known to and identifiable by law enforcement officers.

The *Ruhe* factor relating to "the knowledge of the searching officers" strongly supports our position that the search was undertaken in good faith. Thus, Agent Wenko, the lead agent in the search, states in his affidavit:

> 3. After the robbery of the First Virginia Bank, 300 South Washington Street, Alexandria, Virginia, I was familiar with the specifics of that robbery, namely, that a semi-automatic handgun was used and the amount of loss in the robbery.
>
> 7. At approximately 9:00 to 9:15 p.m., I received a call from SA Lawlor who informed me that he had obtained a telephonic search warrant for Dickerson's apartment from U.S. Magistrate Judge Kenkel. SA Lawlor told me that the warrant was signed.
>
> 8. I knew from previous discussions with Agent Lawlor that we were applying for a search warrant to seize evidence of the robbery of the First Virginia Bank on January 24, 1997. More important, I have been investigating bank robberies for about seven years, and I know what evidence of bank robberies we search for: guns, money, bait bills, dye-stained money and dye-stained objects, burned money, clothing, shoes, disguises, carrying bags, gloves. These were the objects I and the other searching agents were looking for in Dickerson's apartment. I knew precisely what to search for and did not feel that I needed any other guidance.
>
> 9. I relied in good faith on the warrant signed by Judge Kenkel in searching Charles Dickerson's apartment and seizing evidence from that apartment.

This shows that Agent Wenko knew the purpose of the search, the specifics of the First Virginia Bank robbery—including that a semi-automatic handgun was used and the amount of the loss—and knew from experience the particular items that typically constitute evidence of bank robbery.

We have discussed, here and in our original pleading, the cases setting out a standard for the particularity requirement. The court also discussed some of these cases, as did defense counsel. In truth, the line dividing language found sufficiently particular from language found too general is a fine one indeed. The cases falling on one side are so similar to those falling on the other that only the most exacting eye could expect routinely to distinguish the one from the other. But it is precisely that fact that tells the tale here. In order to overcome the good faith exception, the defense must show that the warrant was "so facially deficient" that *no* reasonable officer could believe it to be valid. *United States v. Hyppolite*, 65 F. 3d 1151, 1156 (4th Cir. 1995) (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). While there may well be room to doubt the specificity of this warrant, that exacting test is one the defense has failed to meet. Accordingly, the good faith exception should apply, and the Court should reconsider its suppression order.

CONCLUSION

Dickerson's statements and the fruits of the search of his apartment should be held admissible. In addition, the Court should strike from any Opinion in this case accusations that Agent Lawlor gave untruthful testimony. Alternatively, we ask for re-opening of the suppression hearing.

Respectfully submitted,

HELEN F. FAHEY
United States Attorney

By: /s/ Justin W. Williams
JUSTIN W. WILLIAMS
Assistant United States Attorney
Chief, Criminal Division

/s/ Robert C. Chestnut
ROBERT C. CHESNUT
Assistant United States Attorney
Chief, General Crimes Unit

/s/ William G. Otis
WILLIAM G. OTIS
Senior Litigation Counsel

/s/ Vincent L. Gambale
VINCENT L. GAMBALE
Assistant United States Attorney
VSB# 33646

/s/ Kathleen M. Kahoe
KATHLEEN M. KAHOE
Assistant United States Attorney

/s/ Robert A. Spencer
ROBERT A. SPENCER
Assistant United States Attorney

AFFIDAVIT

I, Thomas O. Durkin, being duly sworn, depose and say:

1. I am a Detective with the Alexandria Police Department. I have been a Detective for ten years and I have been employed by the Alexandria Police Department for 20 years.

2. I was involved in the investigation of Charles Dickerson in the robbery of the First Virginia Bank, 300 South Washington Street, Alexandria, Virginia, on January 24, 1997.

3. On January 27, 1997, I was present at Dickerson's apartment at 8313 Garland Avenue, Takoma Park, Maryland. Approximately 10 law enforcement officers were present when we knocked on Dickerson's door to ask him to come to the FBI field office to answer questions about the January 24, 1997, bank robbery.

4. Although Dickerson was a suspect in the armed robbery of the First Virginia Bank, before we knocked on Dickerson's door, we did not discuss whether to draw our weapons. I was not directly in front of the door, and I did not draw my weapon. Often in situations where I go to interview a suspect in a violent crime, I will have my weapon drawn so that it is ready, but hidden behind my leg or back so that it is not visible and intimidating to the suspect. I do not recall whether the other law enforcement officers present on January 27, 1997, had their weapons drawn.

5. Agents explained to Charles Dickerson that we wanted to talk with him about a bank robbery in Alexandria on January 24, 1997, and that, although he was not under arrest, we wanted him to come to the FBI

field office to answer questions. We told him that he was free to go. He agreed to come to the FBI office.

6. Agent Chris Lawlor, I, and perhaps one other agent followed Dickerson back to his bedroom. The other agents stayed in the entryway. In his bedroom, Dickerson picked up his coat and under the coat we saw a pile of cash, including $100 bills. Dickerson said it was his money and he put it in his pocket to take it with him.

7. Charles Dickerson rode with SA Lawlor and SA Armin Showalter to the FBI field office. I rode in a separate car. Once at the FBI office, I was put in an interview room with Dickerson, and after that I was never away from him that night. Dickerson arrived at the FBI field office at approximately 6:00 p.m.

8. In the interview room, Dickerson was told that he was not under arrest, that he was free to go, and he was told that he would be given a ride home.

9. Dickerson told me and SA Lawlor that he was in Alexandria on January 24, 1997, and he drew a map showing where he was. The map showed the area around the corner from the First American Bank that was robbed. Dickerson said, however, that he was there looking at a restaurant, that he ran into a friend named Terrance, and would admit to nothing else.

10. At some point, Agent Lawlor left the interview room, leaving me alone with Dickerson. Dickerson continued to talk with me about such subjects as his career as a hair stylist. After a time, and I am not sure how long, SA Lawlor returned and told Dickerson that "we are going to search your apartment." I do not recall Agent Lawlor mentioning a search warrant. Again, SA Lawlor was gone from the interview room for some time. Agent Lawlor then returned to the interview room, and

SA Lawlor and I advised Dickerson of his Miranda rights. Dickerson signed a written waiver of his Miranda rights. Still, however, he stuck to his earlier story. Then, SA Lawlor was paged and left the room to make a phone call.

11. During this time when I was alone in the interview room with Charles Dickerson, I asked him to write down what he did that day, and I gave him a white sheet of paper and a pen. That piece of paper is attached to this affidavit as Exhibit A. Dickerson wrote that he was read his rights at "7:30 But I was here at 5:30." I am sure that Dickerson wrote that after he was advised of his Miranda rights. When he wrote that, I specifically recall thinking that Dickerson had no idea what time it was.

12. Shortly, Agent Lawlor returned and told Dickerson that they had found a bait bill from a bank robbery in his apartment. At that point, Dickerson then told us that he had been with Jimmy in Alexandria on January 24, 1997, that he knew Jimmy was a bank robber, and that he had washed dye-stained money for Jimmy in the past. I am sure that Dickerson was read his Miranda rights before he made these statements.

13. After Agent Lawlor was informed about the bait bill found in Dickerson's apartment and after Dickerson made the admissions, he was told he would be charged with bank robbery. Before we learned of the bait bill, we were not going to arrest Dickerson and he would have been allowed to leave the FBI office. As we had told him, and as I typically do, I and another officer would have given Dickerson a ride home if he had asked for one.

14. From the time Dickerson left his apartment to the time he admitted he was with Jimmy Rochester in Alex-

andria on January 24, 1997, approximately four hours passed. During the time Dickerson was in the interview room at the FBI offices, he was offered soda and he was allowed to, and did, use the bathroom.

15. Throughout the evening, Dickerson was never touched or threatened or promised anything to induce him to talk. He appeared to me to understand what was going on and to communicate effectively with us.

/s/ Thomas O. Durkin
THOMAS O. DURKIN
Detective
Alexandria Police Department

[Notary Omitted in Printing]

BEST AVAILABLE COPY

I was read my rights
at 7.30 PM I was done at
5:30 I talked to the two ~~Detectives~~
Detective Thomas Durkin and Agent Lawlor
for two and a half hours and then
was asked ~~[illegible]~~ to take a polygraph test
I declined because after two hours I had
knowledge of the bank robbery.
I told them I know nothing of the bank
robbery that happened friday.
Before today I didn't have any knowledge of the
bank robbery.

AFFIDAVIT

I, Lawrence Kevin Wenko, being duly sworn, depose and say:

1. I am a Special Agent of the Federal Bureau of Investigation ("FBI") and I have been so employed since September 1988. I am currently assigned to a squad that investigates bank robberies.

2. I was involved in the investigation of Charles Dickerson regarding the robbery of the First Virginia Bank, 300 South Washington Street, Alexandria, Virginia, on January 24, 1997. I was the lead agent in the search warrant of Dickerson's apartment at 8313 Garland Avenue, Apartment 3, Takoma Park, Maryland, on January 27, 1997.

3. After the robbery of the First Virginia Bank, 300 South Washington Street, Alexandria, Virginia, I was familiar with the specifics of that robbery, namely, that a semi-automatic handgun was used and the amount of the loss in the robbery.

4. On January 27, 1997, in the late afternoon or early evening, I was present with other agents when we knocked on Dickerson's apartment door to talk with him. Approximately ten agents were in the area, but not all agents went to the door of the apartment. I, and other agents, took up stations around the perimeter of the apartment. We suspected that Dickerson was involved in the armed bank robbery that occurred on January 24, 1997, because his car had been seen leaving the area of the robbery. Our plan was to ask Dickerson to come voluntarily to the FBI field office to answer questions; we were not going to arrest him unless he made incriminating statements. Before knocking on Dickerson's door, we had no discussions about whether to draw our weapons, and I had no expectations that the other agents would or

would not have their weapons drawn. In my experience, agents sometimes draw their weapons and sometimes do not draw their weapons in situations like this. I took up a station at the rear of the apartment, and I drew my weapon out of my holster, but I kept it down next to the holster, near by hip, pointed at the ground.

5. Charles Dickerson left his apartment voluntarily and was driven to the FBI field office by SA Christopher Lawlor and SA Armin Showalter. Charles Dickerson was told that he was not under arrest.

6. After Charles Dickerson left his apartment, I and three other agents waited outside Dickerson's apartment in FBI cars. We watched Dickerson's apartment to make sure that no one went in or out of the apartment. I knew that SA Lawlor was going to talk with Dickerson and was going to try to obtain a search warrant.

7. At approximately 9:00 to 9:15 p.m., I received a call from SA Lawlor who informed me that he had obtained a telephonic search warrant for Dickerson's apartment from U.S. Magistrate Judge Kenkel. SA Lawlor told me that the warrant was signed.

8. I knew from previous discussions with Agent Lawlor that we were applying for a search warrant to seize evidence of the robbery of the First Virginia Bank on January 24, 1997. More important, I have been investigating bank robberies for about seven years, and I know what evidence of bank robberies we search for: guns, money, bait bills, dye-stained money and dye-stained objects, burned money, clothing, shoes, disguises, carrying bags, gloves. These were the objects I and the other searching agents were looking for in Dickerson's apartment on January 27, 1997. I knew precisely what to search for and did not feel that I needed any other guidance.

9. I relied in good faith on the warrant signed by Judge Kenkel in searching Charles Dickerson's apartment and seizing evidence from that apartment.

10. At 9:23 p.m., I photographed the front door of Dickerson's apartment, and at 9:25 p.m. I and other agents entered the apartment. These times are noted on the FD-302 for that evening. The search ended at 12:05 a.m. I wrote the inventory for the search that evening, and that inventory is attached to this affidavit at exhibit A.

11. Upon entering Dickerson's apartment, I went to the rear room, his bedroom. In a low dresser drawer, I found a burned $20 bill, which from my experience appeared to have been burned by an explosive dye pack. I called on my radio to the FBI radio room and asked them to run the serial number from the $20 bill through the NCIC to see whether the bill was a bait bill. In several minutes, I received a radio call that the $20 bill was listed as a bait bill given in a Maryland bank robbery. Then, approximately 30 to 45 minutes after I entered Dickerson's apartment, I called SA Showalter at the field office and told him that we had recovered a bait bill from a Maryland bank robbery. I called Agent Showalter to provide him evidence on which he could arrest Charles Dickerson. That is the only call I made to the FBI field office to report on the items found in the apartment, and, as far as I know, no other agent in Dickerson's apartment called the FBI field office.

12. Soon after talking to SA Showalter, I found the loaded silver, semi-automatic .45 caliber handgun in Dickerson's bed room [sic] closet. It had been put in a pile of clothing just inside the closet door.

13. During the search, we found and seized the items set forth on my inventory. Guns, ammunition, clothing, money, masks, and gloves were seized as evidence of

bank robberies. I seized the letters, photographs, address book, and phone bill as evidence of who Dickerson's associates were. The drugs and drug paraphernalia are contraband that I seized because they were in my plain view during the search. The mesh bag I seized appeared to me to be stained with dye-pack dye.

14. My understanding on January 27, 1997, was that Dickerson would not be arrested unless he confessed or some evidence implicating him in a bank robbery was found in his apartment. I understand that once I found the bait bill in his apartment, there was enough evidence to arrest Charles Dickerson. In my experience, it is common for agents on my squad to ask a suspect in a violent crime to come to the FBI office to be interviewed and then let that suspect go after the interview. This is true even where we believe that the suspect is responsible for the crime, and even where we may have probable cause for an arrest but not a strong enough case to bring to trial. For example, I recently interviewed a suspect in an armed robbery of an armored car. He gave not enough inculpatory statements during the interview for me to arrest him, and so I let him go. It is my practice, and that of others on my squad, including SA Lawlor, when finished with such an interview, to give the suspect a ride back to his residence, or call him a cab if he prefers, or allow him to wait for someone to pick him up.

15. The following are examples of cases where I was involved in investigations where my squad interviewed a suspect in an armed bank robberies [sic] and then did not arrest the suspect and let him go:

a. In 1995, a suspect, who had a felony conviction for bank robbery, approached an FBI informant and asked to rob a bank with him. I and other members of my squad followed the suspect and the informant driving around in the suspect's car and videotaped them casing

several banks in Alexandria, Virginia. When we thought they were about to rob a bank, we intervened and brought the suspect to the FBI field office to interview him. After consulting with the U.S. Attorney's Office, we decided that the case was not strong enough to prove beyond a reasonable doubt. The suspect was allowed to leave the FBI office, and he was given his car back and he drove himself home.

b. In June 1997, in Prince William County, Virginia, I and other agents from my squad stopped a vehicle that was seen leaving the scene of two attempted armed bank robberies. A suspect reported to have been driving the car at the time of the robberies, and a suspect driving the car when I stopped it, were taken to the Prince William County Police Department for questioning. I believed that one of the suspects was the driver during the two attempted bank robberies, but that suspect refused to make any admissions. After consulting with the U.S. Attorney's Office, we let the two suspects go. I and other agents drove the two suspects home.

c. In February 1997, in Alexandria, Virginia, a distinctive vehicle, a black Mazda RX-7, was seen leaving the scene of an armed bank robbery. The vehicle was located in Prince George's County, Maryland, and the registered owner of the car was located there and voluntarily brought back to the FBI field office for questioning. When he was found in Maryland, the owner of the car was carrying a 9 mm handgun. The gun was confiscated. The suspect made no admissions during the interview, and he was later let go because we decided we did not have enough evidence to prove his involvement in the bank robbery beyond a reasonable doubt. Another agent from my squad drove the suspect home to Prince George's County, Maryland. The suspect remains a suspect in that bank robbery.

16. I was present for much of the interaction with Charles Dickerson and the search of his apartment on January 27, 1997. I feel that the interview of Dickerson and the search of his apartment were done by the book. In addition, I have known and worked with SA Christopher Lawlor for years. He is an honest, experienced, and professional agent, and he would not lie in any manner in connection with a case.

/s/ Lawrence Kevin Wenko
LAWRENCE KEVIN WENKO
Special Agent
Federal Bureau of Investigation

[Notary Omitted in Printing]

2-6-4-11

FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 1 of 3

On (date) 01/27/97

Time: _____

item(s) listed below were:
- ☐ Received From
- ☐ Returned To
- ☐ Released To
- ☑ Seized

(Name) CHARLES DICKERSON
(Street Address) 8313 GARLAND STREET
(City) TAKOMA PARK, MD

Description of item(s):
(1) one S&W MODEL 745 S/n DVC0473
(2) one 45 AUTO ROUND from CHAMBER
(3) one 45 CAL MAGAZINE CONTAINING EIGHT ROUNDS.
(4) one TORN five Dollar bill
(5) Three (3) WINCHESTER 38 SPL ROUNDS
(6) one (1) ROUND WINCHESTER 38 SPL ROUND
(7) One (1) PLASTIC BAG Green Leafy SUBSTANCE
(8) one (1) PAIR gold colored glasses frame no glass.
(9) one (1) VIRGINIA ID CARD CHARLES DICKERSON SSAN 579-98-6292
(10) One (1) OPENED bag LATEX gloves.
(11) one (1) WHITE PAPER bag CONTAINING one (1) ROUND 357 magnum
(12) one (1) TANITA MODEL 1479 SCALE AND CASE.
(13) one (1) leather like vest with plastic bag in left pocket containing WHITE SUBSTANCE.
(14) one (1) MORTH CAROLINA CITATION # 7574940-1
(15) DISTRICT COURT of MARYLAND (Mont Co) CASE # 3D00035024 paperwork.
(16) Reciept CASE ADVANCE WILLARD O. GALERY II

Received by: [signature] (Signature) Received from _____ (Signature)

FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

114

On (date) 01/27/97

Time: _____

item(s) listed below were:
- ☐ Received From
- ☐ Returned To
- ☐ Released To
- ☑ Seized

(Name) CHARLES DICKERSON
(Street Address) 8313 GARLAND STREET
(City) TAKOMA PARK, MD

Description of item(s):

(17) ROCHE BOBOIS RECIEPT.
(18) DISTRICT COURT of MARYLAND Criminal System Inquiry
(19) MONTGOMERY County Detention Center Money Reciept.
(20) One blue colored Fahrenheit zipped bag containing plastic bag with NINE (9) 45 AUTO ROUNDS.
(21) One black vinyl Address book.
(22) Two (2) white dust masks.
(23) Twenty four (24) one Dollar bills
(24) one (1) dye stained $10 s/n B 89668634C
(25) one (1) dye stained $1 s/n E 94987678F
(26) Two (2) dye stained $2 s/n E 54680293A
E 18685869A
(27) one (1) bluish stained $10 s/n D68705312A
(28) one (1) bluish stained $1 s/n E 23397722
(29) Two (2) one Dollar bills
(30) one dye stained / burnt $20 s/n C 592629
(31) one bluish stained $10 s/n A 92079571A
(32) one Washington D.C. Drivers License for WILLARD GALERY
(33) one BLACK KNIT MASK
(34) one CROSSMAN REPEATER s/n 95597642 B.B .177 CAL

Received by _____ SA FBI (Signature)

Received from _____ (Signature)

FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 3 of 3

On (date) 01/27/97

Time:

item(s) listed below were:
- ☐ Received From
- ☐ Returned To
- ☐ Released To
- ☑ Seized

(Name) CHARLES DICKERSON
(Street Address) 8313 GARLAND Street
(City) TAROMA PARK, MD

Description of Item(s):
(35) One (1) receipt Dated 1/27/97
Box - (36) One (1) District Court of Maryland for Montgomery County Case # 0D00035021
Box - (37) Two Photographs
Box - (38) BELL ATLANTIC Bill
Box - (39) Cellular one Bill
Box - (40) Certificate of title for 82 CHEV. VIN 2G1AN69H8C1262951
Box - (41) Certificate of title 95 Missan Tk to Rodney Davis
Box - (42) TAJ MAHAI letter.
Box - (43) One (1) mesh bag
Box - (44) One small Address Book. - [illegible]
Box - (45) One Business Card.
Box - (46) One (1) set Keys to CHEV.

— END —

LKW LKW LKW LKW

Received by: Lamar Ken Wick, SA, FBI WFO (Signature) Received from (Signature)

BEST AVAILABLE COPY

[Filed July 28, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

[Caption Omitted in Printing]

DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION

COMES NOW the Defendant, Charles Dickerson, through counsel, and respectfully submits this Opposition to Government's Motion for Reconsideration.

Motions to reconsider are disfavored by the Court, particularly in cases where the issues in question have been fully briefed and litigated in open court. Absent the presentation of extraordinary circumstances involving matters not within the moving party's control at the time of the original motion, Motions to Reconsider should be summarily denied.

The Government contends this case is unique and worthy of reconsideration because the Court based its ruling, in part, on the lack of credibility it found in an FBI agent's testimony. The Government argues what is "[a]t stake here is not only our ability to bring Dickerson to book for multiple armed robberies, but also quite possibly an agent's career."

The potential effect of the Court's ruling on Agent Lawlor's career is not a matter for judicial consideration. If that question is to be addressed, it will be done internally by the FBI. The question before this Court is

limited to whether Mr. Dickerson's constitutional rights were violated on the night of January 24, 1997. After a full presentation of all relevant evidence and applicable law, the Court took the matter under advisement. After careful consideration, the Court ruled that the [sic] Mr. Dickerson's rights were violated and that suppression of his statement's [sic] to the police and the items discovered during the search of his home was required. The Court supported this decision with a lengthy written opinion clearly stating the facts and the law it relied upon in reaching this decision.

The Government now asks the Court to reverse this decision, and, in support of this request, attempts to supplement the record with affidavits of witnesses and other evidence it elected not to present at the suppression hearing. The Defendant objects to the untimely presentation of this evidence and asks that the Court refuse to admit it as part of the record in this case. This evidence is not newly discovered. All of it was available to the Government at the time of the suppression hearing. The affidavits are from special agents of the FBI who have been involved in this investigation since Mr. Dickerson's arrest. The written statement purportedly made by Mr. Dickerson has been in the custody and control of the Government since the Defendant's arrest, yet it was not provided to the Court or to the Defendant until after the Court issued its ruling on the Defendant's Motion to Suppress.

As will be discussed, even if this new evidence is taken into account, it does not provide the Court with a sufficient basis to reverse its ruling. The Defendant therefore asks that this Honorable Court deny the Government's Motion to Reconsider.

A. ***The Court correctly ruled that Dickerson was in custody and subjected to interrogation prior to being advised of his Miranda rights.***

1. ***The Defendant was in police custody when his statements were obtained.***

In ruling on the Motion to Suppress, the Court held that Mr. Dickerson was in custody when he was taken from his residence. The Court made specific findings of fact in support of this ruling:

> In this case, several armed police officers and federal agents entered Dickerson's home after dark and asked him to accompany them to the station. They then took Dickerson across the state line, on a ten-mile ride through the District of Columbia to the FBI field office near Buzzard's Point, in Southwest D.C. . . . [H]e was not told he was free to go. After the interrogation described above, and without leaving the presence of the officers and agents, he was arrested. . . .
>
> Under these circumstances, Dickerson's "freedom of movement" was as restricted as if he had been arrested. . . . [T]he only circumstance of Dickerson's encounter with the agents that night which would have changed had he been arrested at the outset rather than the end is that he would have been read his rights earlier. To allow law enforcement officers to circumvent *Miranda* by merely delaying their inevitable arrest of a suspect until he or she offers an uncounseled and unwarned confession would ultimately gut the intent of *Miranda* and its progeny.

These conclusions are fully supported by the record before the Court. Even if considered, nothing in the new

affidavits offered by the Government contradicts the chain of events as recited by the Court. Both Det. Durkin and Agent Wenko admit they were armed. Agent Wenko admits he had his weapon drawn. Det. Durkin admits he and perhaps two other agents followed Mr. Dickerson into his bedroom. Det. Durkin does not state that Mr. Dickerson consented to the agents presence in his room. The affidavits confirm that Mr. Dickerson was taken by the officers to the FBI field office in Washington, D.C. It is undisputed that he was formally advised that he was under arrest while at the field office. He never returned voluntarily to his home that night. Thus, no basis has been provided by the Government to warrant reversal of this portion of the Court's ruling.

2. *The Defendant was not properly advised of his Miranda rights.*

Having found Mr. Dickerson to be in custody, the Court then ruled that he was not timely advised of his *Miranda* rights. In reaching this conclusion, the Court relied upon the documents submitted by the Government and the testimony of Mr. Dickerson. The Court rejected the testimony of Special Agent Lawlor because it was rebutted by the Government's own documents. On the other hand, Mr. Dickerson's testimony regarding when he was Mirandized was fully corroborated by the times recorded on the search warrant and the rights waiver form.

Again, nothing in the affidavit of Det. Durkin refutes the Court's conclusion. The affidavit does not explain how or why these documents indicate a one hour gap between when the search warrant was issued and when Mr. Dickerson was finally Mirandized. Only Mr. Dickerson's explanation that he was not Mirandized until after he made all of his statements to the police adequately fulls [sic] in the recorded time gap.

The Government contends that the times supplied by the officers is not relevant, only the sequence of events which they recite is important. This argument fails to account for the fact that Mr. Dickerson provided a different sequence of events. The recorded times therefore are crucial to assess which version is correct. The recorded times corroborate Mr. Dickerson's version and rebut the Government's. Accordingly, the Court's ruling that Mr. Dickerson was not Mirandized before he gave his statements is well grounded in the factual record and does not warrant reconsideration or reversal.

In a last ditch effort to avoid suppression, the Government argues that, even if Mr. Dickerson's statements were obtained through custodial interrogation without *Miranda* warnings, the statements are still admissible under 18 U.S.C. § 3501. *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny clearly hold that statements obtained during custodial interrogation are not admissible unless the requisite warnings are given prior to questioning. The Government cites no cases, and defense counsel is unaware of any, which hold that the passage of 18 U.S.C. § 3501 in 1968 overruled the *Miranda* doctrine. 18 U.S.C. § 3501 is a procedural statute which sets forth how and when a trial court is to assess the voluntariness of a confession. The fact that *Miranda* warnings have been given does not, of itself, lead to the conclusion that a confession was voluntary. *Brown v. Illinois*, 422 U.S. 590 (1975); *U.S. v. Johnson*, 495 F.2d 378 (4th Cir. 1974). However, the failure to give *Miranda* warnings prior to custodial interrogation conclusively renders any statements involuntary and inadmissible.

B. *The Court correctly ruled that the warrant was invalidly vague and that the officers executing it acted in bad faith.*

1. *The search warrant did not state with particularity the items to be seized.*

Prior counsel for Mr. Dickerson provided the Court with a lengthy brief examining the law and cases governing the particularity requirement for search warrants. *See* Defendant's Second Supplemental Memorandum in Support of Defendant's Motion to Suppress Statements and Physical Evidence, pp. 7-14. In its Motion to Reconsider, the Government has not provided the Court with any new materials in support of its position that the items to be seized were sufficiently described in the warrant. On this issue, the Government is relying on its original pleadings. For the sake of brevity and judicial economy, the Defendant will do the same.

The Government does offer to the Court the affidavit of Special Agent Wenko who executed the search warrant. In the affidavit, Agent Wenko explains that, given his years of experience and familiarity with this investigation, he knew what items to search for and limited his search accordingly. It is precisely this type of on the scene police discretion that the particularity requirement of the Fourth Amendment prohibits. This same use of discretion was addressed by the Court in *United States v. Buck*:

> While it can safely be said that the police here performed reasonably under the circumstances . . . they clearly did not insure that all the known facts were included in the warrant. The warrant only described the crimes—and gave no limitation whatsoever on the kind of evidence sought. In short, "the warrant left it entirely to the discretion of the officials conducting the search to decide what items were to be seized, and thus was not permissible under the Fourth Amendment.

813 F.2d 588, 589 (2nd Cir. 1987).

Warrants which fail to state as nearly as possible the distinguishing characteristics of the goods to be seized are conclusively invalid. *United States v. Robertson*, 21 F.3d 1030, 1033 (10th Cir. 1994). The fact that the executing officers may have conducted a reasonably limited search will not cure the problem. It is the lack of review and guidance from a neutral magistrate which renders the warrant constitutionally invalid.

2. *The "good-faith" exception to the warrant requirement is not applicable.*

The Fourth Amendment to the Constitution states that "no warrant shall issue but upon probable cause." The Fourth Circuit has stated that "[p]robable cause to search exists when, at the time the magistrate issues the warrant, there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of crime and will be present at the time and place of the search." *United States v. Suarez*, 906 F.2d 977, 984 (4th Cir. 1990). "The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is . . . whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause." *United States v. Giordano*, 416 U.S. 505, 555 (1974) (Powell, J. concurring in part and dissenting in part); *United States v. Hawkins*, 788 F.2d 200, 203 (4th Cir. 1986).

Pursuant to the "good-faith" exception adopted in *United States v. Leon*, 463 U.S. 981 (1983), evidence obtained by law enforcement officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause can still be used in the prosecution's case-in-chief. Even under this broad exception, however, suppression is still appropriate where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

The search warrant issued in this case is based on just such an affidavit. The affidavit, a recorded oral statement by Special Agent Lawlor given under oath over the telephone, contains information regarding cash seen in Mr. Dickerson's residence and statements made by Mr. Dickerson while in police custody. This information is unconstitutionally tainted and must be redacted from the affidavit before determining the existence of probable cause. The affidavit does not contain any information supporting the detective's assertion that relevant evidence would be located in the residence. This is especially true once the tainted information is removed.

Similar affidavits have been characterized as "bare-boned" leading to the conclusion that the magistrate abandoned his detached and neutral role and acted merely as a "rubber stamp." Under such circumstances, the good-faith exception of *Leon* cannot be applied and evidence obtained pursuant to the search warrant must be suppressed.

> [T]he good-faith exception to the exclusionary rule should not apply . . . due to the "bare bones" nature of the affidavit, and because the state magistrate could not have acted as other than a "rubber stamp" in approving such an affidavit. *See United States v. Laury*, 985 F.2d 1293, 1311 n. 23 (5th Cir. 1993) (defining "bare bones affidavit" as one that contains "wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause.")

United States v. Wilhelm, 80 F.3d 116 (4th Cir. 1996) (citing *United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir. 1993) and *United States v. Barrington*, 806 F.2d 529, 532 (5th Cir. 1986)).

Any belief that evidence related to robbery could be found in Mr. Dickerson's residence was based on a mere hunch or suspicion, not known facts articulated in the affidavit. This lack of known facts is precisely why the warrant did not state with particularity what was to be seized during the search: Agent Lawlor did not know what might be found in the residence, therefore, he could not state it with particularity. The law is well settled that substantially more than this is required to support the issuance of a search warrant.

Given the lack of facts in the affidavit upon which to conclude that evidence of robbery could be found in Mr. Dickerson's residence as well as the lack of any statements limiting the scope of the search, any official reliance on the warrant by the executing officers was unreasonable. As in *Wilhelm, supra.*, this is not a case of "objectively reasonable law enforcement activity." The sworn statement by Special Agent Lawlor did not "provide the magistrate with a substantial basis for determining the existence of probable cause." *United States v. Leon*, 468 U.S. at 923. In addition, the magistrate acted as a rubber stamp in finding the evidence sufficient to establish probable cause to search. Officers will not be allowed to claim reliance on a warrant if it is "so facially deficient—i.e.,

in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *United States v. Owens*, 842 F.2d 462 (4th Cir. 1988), *citing United States v. Leon*, 468 U.S. 897, 923 (1984).

The warrant issued to search Mr. Dickerson's home was overly broad, vague, and unsupported by probable cause. The search executed pursuant to this invalid warrant was unconstitutional because the warrant was so lacking in indicia of probable cause and particularity as to render official belief in its validity unreasonable.

Based on the foregoing, the Defendant requests that this Honorable Court deny the Government's Motion to Reconsider.

Respectfully submitted,

CHARLES THOMAS DICKERSON
By Counsel

/s/ James W. Hundley
JAMES W. HUNDLEY
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Caption Omitted in Printing]

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 9 a.m. on August 1, 1997.

BEFORE: The Honorable James C. Cacheris, Presiding Chief Judge, United States District Court

* * * *

[2] PROCEEDINGS

THE COURT: Let me take Dickerson, Charles Dickerson.

Good morning, Ms. Kahoe. Good morning, Mr. Spencer.

MS. KAHOE: Good morning, Your Honor. Kathleen Kahoe and Rob Spencer for the United States.

MR. HUNDLEY: Good morning, Your Honor. Jim Hundley for Mr. Dickerson.

THE COURT: Let the record note he's present in person.

Comes on two motions for reconsideration, plus a motion in limine. I'll go ahead and hear the government's motion for reconsideration, they filed first.

MS. KAHOE: Your Honor, I don't know if the Court wants to hear us reiterate what we have filed already.

THE COURT: I realy [sic] don't need a lot of reiteration. The question is, why didn't you put this evidence on on the first time?

MS. KAHOE: I think, Your Honor, there are two reasons. In the first instance, the defendant's motions, this was the defendant's second round of motions in this case because of the replacement of the attorney. His motions were filed, one was filed three days before the hearing, and one was filed two days before the hearing. So [3] there was really very little time to prepare even one agent much less a number of agents, in addition to which the government rarely puts on a number of agents at a motion to suppress.

In this case we had no reason to believe that Agent Lawler's testimony would not be sufficient. Hearsay is often submitted at these hearings, and we usually don't put on a number of agents so that it won't be a protracted procedure and it won't be a mini-trial in effect and put on the government's whole case.

Agent Lawler has worked with the attorneys in our office for years, and he is one of the better respected agents.

THE COURT: Let me ask you this as well. Some comment was made about his neck which I had no notice of his neck problem that he apparently broke. Don't agents take physicals every year?

MS. KAHOE: Oh, yes.

THE COURT: And he is not under any disability.

MS. KAHOE: No; he just can't move his head. So his head is sort of canted down, can't move.

THE COURT: I didn't notice anything unusual. I made no decision on the basis that he couldn't move his neck, or what have you. I mean, the decision wasn't based on that.

[4] MS. KAHOE: There are a couple of comments among the footnotes about the agent's demeanor, and we were concerned that that might have influenced the Court.

THE COURT: That was not a reason for it, but, okay, I understand.

MS. KAHOE: We would ask the Court to consider these additional affidavits of the agents who could have been put on. We can put them on again live.

THE COURT: In other words, you're telling me this was a short time span that you had to get it ready and that's what happened.

MS. KAHOE: Yes, sir.

THE COURT: I suspect it's one of these deals where they threw the file at Mr. Spencer at 4 o'clock on the day before.

MS. KAHOE: And, in addition, Agent Lawler I don't think focused on that span of time between the search warrant and the Miranda.

THE COURT: His time line didn't jibe.

MS. KAHOE: There was 50 minutes approximately. He referred to it as a few minutes which I'm sure after four or five months since this has happened that his testimony occurred, in retrospect to him it probably didn't seem like a very long time. He was very busy, setting up the search and doing things, and I just don't think that he focused on [5] the fact that it was a longer period of time. He didn't obviously look at those documents. He obviously would not lie about that when it's documented like that. So I think that was just an error on his part.

THE COURT: Okay, thank you.

Mr. Hundley, I will hear your opposition to theirs and the affirmative of your motion to reconsider, hear your opposition to the government's and then your affirmative motion.

MR. HUNDLEY: My motion to reconsider—

THE COURT: Yes, sir.

MR. HUNDLEY: The Court denied, yes, sir.

Your Honor, I believe, I certainly hope I stated it fairly clearly in my opposition to their motion our basis for opposing their motion to reconsider. I would in the first instance ask the Court to not consider the new evidence that they have submitted. They had ample opportunity to present that at the prior hearing and for whatever reason—

THE COURT: They are telling us in essence they didn't have, it was one of these deals where they threw a file at an assistant late one afternoon the day before the hearing, that's what they are telling me, which they did a good job in the case.

Okay, go ahead.

[6] MR. HUNDLEY: I guess they're responsible for the innerworkings of their office, the government's in totality, not Mr. Spencer in and of himself, but he represents the government, he is an agent of the government. They have to do a better job of getting the files to their assistant in time to adequately prepare.

There was a full, transcribed hearing before this Court upon which the Court based its decision. I don't believe that at this time it's appropriate to—

THE COURT: Let me hear the affirmative of your client's motion.

MR. HUNDLEY: Yes, Your Honor.

Essentially, I raised the same arguments in my motion to reconsider that I raise in the defendant's I guess you call second motion to suppress. The Court declines to suppress the evidence seized from the automobile—

THE COURT: Yes, sir.

MR. HUNDLEY: —finding that the statements of James Rochester as well as the witness itself was sufficient. I would submit, Your Honor, and ask the Court to apply the fruit of the poisonous tree doctrine to that portion of

the probable cause, Mr. Rochester's statements regarding the fact that evidence of bank robbery could be found in the car because the government never would have found Mr. Rochester to obtain those statements and to obtain [7] that probable cause but for their unconstitutional treatment of Mr. Dickerson.

It's my position, one, and as the Court has found, he was not properly Mirandized. I know the Fourth Circuit just recently in the United States versus Elie came out with really a case of first impression in how that they were not going to apply the fruit of the poisonous tree doctrine to pure and simple, I guess you could characterize them, Miranda violations, but they didn't say that the fruit of the poisonous tree doctrine did not apply to Constitutional violations.

So, one, let me say for the record I would ask the Court, I am not waiving my argument the fruit of the poisonous tree doctrine should apply simply because of the Miranda violation, but I think I have to acknowledge that U.S. versus Elie is binding precedent on this Court, but I'm not waiving that argument.

But I would argue in the alternative that when Mr. Dickerson was arrested, that was an unconstitutional arrest because there was no probable cause to support it. The Court ruled in its memorandum opinion that he was basically under arrest at the time that the armed agents entered his house and took him down to the FBI field office in Southwest Washington, D.C.

Police officers can of course arrest somebody [8] without a warrant for a felony if they have probable cause to believe, one, that a felony has been committed, which I don't dispute in this case but, two, what is a dispute in this case, that it was the defendant who committed it. And at the time of this arrest, the police had no evidence linking Mr. Dickerson or identifying Mr. Dickerson as

being involved in these bank robberies, the bank robbery in Alexandria in specific.

THE COURT: I understand your argument.

MR. HUNDLEY: Okay. So, based on that, just in conclusion, they never would have gotten to James Rochester but for the unlawful arrest which led to Mr. Dickerson's statement which ultimately led to James Rochester.

THE COURT: Ms. Kahoe, hear your rebuttal as well as your answer in response to that, go ahead.

MS. KAHOE: Yes, sir.

Clearly this Court found that there was probable cause for that arrest. The agents may not have thought so, but this Court found that there was, so there was no illegal arrest in the opinion of this Court.

Even if there had not been probable cause and even if that arrest was not legal, we would have found Mr. Rochester. There was a warrant outstanding for him from Atlanta, and he had been arrested here in Maryland and his fingerprints were on file. And those two things would have [9] been matched up eventually.

So there would have been an inevitable discovery. In addition to which the attenuation doctrine would allow us to use his testimony. He in fact has not testified yet. So quite some time has past between the statements made by Mr. Dickerson and Mr. Rochester's anticipated testimony, which may be in August, may be later than that. The search of the car took two months after this. So the attenuation doctrine would apply to that.

For those reasons, I think most importantly, the reason that the arrest is found to be legal, because there was probable cause for it, but for those other reasons, also Mr. Dickerson's statements for that purpose, the derivative evidence should be admissible: in other words, a search of the car and Mr. Rochester's identity should not be suppressed.

THE COURT: I'm going to take both motions to reconsider under advisement. I will file a written opinion, let you know early next week.

Take the motion in limine, you have a motion in limine.

MR. HUNDLEY: I do, Your Honor.

Your Honor, in my motion I listed I believe there are six instances of what the government has characterized as 404(b) other crimes evidence. They have actually, in [10] their letter, I think they listed in addition to that, but I'm not challenging those.

I am challenging these. I would simply submit that this evidence is, one, not admissible for any of the stated purposes of 404(b) which I'm sure the Court is very familiar with.

THE COURT: Yes, sir.

MR. HUNDLEY: It's simply evidence that's being offered to show that Mr. Dickerson is a person of a character prone to commit the charges for which he has been indicted. This is not evidence of other bank robberies. This is not evidence where a similar modus operandi is at issue.

The government in their rebuttal attempts to argue that it shows evidence of knowledge. Your Honor, to argue it shows knowledge, I think what they are really saying what it shows is that he is somebody who commits crimes; and, therefore, since we know he committed these crimes, he must have also committed the crimes in question. I think that's really just a roundabout way of saying he's got bad character.

THE COURT: His defense is going to be he didn't know a crime was being committed at the time, this, what's the gentleman's name, Rochester, the other guy that was involved? You don't have to answer. If you want to save it [11] for trial, you may.

Mr. Rochester was the guy, right, Mr. Rochester, he supposedly committed these other crimes with?

MR. HUNDLEY: Correct. I guess our defense may well be that, one, he didn't know that Mr. Rochester was committing these crimes, he didn't help Mr. Rochester commit these crimes, and, two, Mr. Rochester is saying that Mr. Dickerson helped him commit these crimes to save his own neck.

THE COURT: Okay, all right, I understand your argument.

Okay, Ms. Kahoe?

MS. KAHOE: Yes, Your Honor, that is exactly our point in this memo, that that probably will be the defense, that he was there but he didn't know what was going on, and these other instances where these people—

THE COURT: Show that he knew what was going on.

MS. KAHOE: Sure, it's intent, it is knowledge, it is modus operandi in large part. But these guns were obtained, crimes were committed at gunpoint. These are very similar crimes, they do go to knowledge, intent, absence of mistake which is something we think he is going to put forth.

THE COURT: Okay, anything else, Mr. Hundley?

MR. HUNDLEY: Your Honor, just in rebuttal to the [12] government's claim that somehow the attenuation doctrine or the inevitable discovery doctrine might apply in this case, I would just point out, one, it's the government's burden to show that by a preponderance of the evidence that those exceptions apply, and I don't think on this record they have done that; and, two, even accepting what they have cited in their pleading, the attenuation cases that they cite involve witnesses who were not involved in the crime itself.

This involves a co-conspirator who is testifying against Mr. Dickerson pursuant to a plea agreement, so I don't think you can say his testimony is so attenuated because it's voluntary. There's clearly questions about his voluntariness, and the inevitable discovery doctrine, the fact that there were warrants outstanding or that his fingerprints were on file, those warrants have been outstanding since September of 1996.

THE COURT: I understand.

As I have indicated, I'm taking the motions to reconsider under advisement.

Now I'm going to rule on the motion in limine, and I'll rule on this orally.

The matter is before the Court on Defendant Charles Thomas Dickerson's Motion in limine. For reasons set forth below, I'm going to grant in part and deny in part.

The facts upon which the case is based are set [13] forth in the Court's several previous memorandum opinions. Dickerson now moves to prevent admission into evidence several alleged crimes in which Dickerson was involved, including an armed robbery, a carjacking, a truck hijacking, an attempted murder, an attempted kidnapping, and drug dealing.

Under Federal Rule of Evidence 404(b), evidence of prior bad acts is inadmissible to show the character of the defendant, but may be introduced to show, *inter alia*, knowledge or absence of mistake. Evidence that is admissible under 404(b) may be excluded if the probative value is substantially outweighed by its prejudicial nature or the danger that it will confuse the jury or waste time. Federal Rule of Evidence 403.

In this case, the government hypothesizes that the defendant may claim that he drove James Rochester to Alexandria on the day of the robbery, but had no idea that Rochester would rob a bank, and now defense counsel has indicated that will be a defense in this case.

If that is how the case unfolds at trial, the government may certainly introduce evidence tending to show that Dickerson knew of Rochester's intent. Accordingly, evidence of the armed robbery would be admissible. How-

ever, evidence of the other is only negligibly probative of any of the other issues listed in 404(b). Moreover, evidence of [14] these crimes would be extremely prejudicial, and such prejudice would substantially outweigh their *de minimus* probativity.

Because evidence that Dickerson has participated in a carjacking, an attempted kidnapping, an attempted murder, a hijacking, and drug dealing fail the tests set forth in both Rule 404(b) and 403, such evidence will not be admissible in the government's case in chief. Evidence that Dickerson has participated in an armed robbery with Rochester may be admitted to show knowledge or absence of mistake.

Thank you. I will let you know as soon as I can on the other issue.

(At 9:35 a.m., the hearing in the above-entitled matter was concluded.)

[Filed Sep. 2, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that, pursuant to 18 U.S.C. § 3731, the United States appeals to the United States Court of Appeals for the Fourth Circuit from this Court's order entered on August 4, 1997, denying the government's motion for reconsideration, and from the related order of July 1, 1997, suppressing physical evidence and statements.[1]

Respectfully submitted,

HELEN F. FAHEY
United States Attorney

By: /s/ Robert A. Spencer
ROBERT A. SPENCER
Assistant United States Attorney

---

[1] The government's timely motion for reconsideration on July 15, 1997 tolled the 30-day period within which to note an appeal from the order of July 1, 1997. *United States v. Ibarra*, 502 U.S. 1 (1991).

CERTIFICATE PURSUANT TO 18 U.S.C. § 3731

I certify that this appeal is not taken for purposes of delay and that the evidence suppressed by the district court constitutes substantial proof of facts material in this proceeding and at Defendant Dickerson's trial.

HELEN F. FAHEY
United States Attorney

By: /s/ Robert A. Spencer
ROBERT A. SPENCER
Assistant United States Attorney

No. 99-5525

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX
Volume II

JAMES W. HUNDLEY *
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, VA 22030
(703) 385-8005

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

JANET RENO
Attorney General
SETH P. WAXMAN *
Solicitor General
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondent

January 28, 2000

* Counsel of Record

PETITION FOR CERTIORARI FILED JULY 30, 1999
CERTIORARI GRANTED DECEMBER 6, 1999

TABLE OF CONTENTS

Volume I

	Page
Criminal Docket Entries	1
Court of Appeals Docket Entries	15
Advice of Rights Form dated January 27, 1997	21
FBI Form 302: Report by Special Agent Christopher Lawlor re: statement of Charles Dickerson (Jan. 29, 1997)	22
Superseding Indictment	27
Transcript of Suppression Hearing before U. S. District Court (May 30, 1997) (excerpt)	35
Defendant's Motion to Suppress and Motion to Reconsider and Memorandums in Support (July 11, 1997)	75
Government's Motion for Reconsideration (July 15, 1997) with supporting exhibits:	86
a. Affidavit of Thomas Durkin dated July 10, 1997 with attached exhibit (handwritten note of Charles Dickerson)	101
b. Affidavit of FBI Agent Lawrence Wenko dated July 8, 1997 (with attachment)	107
Defendant's Opposition to Government's Motion for Reconsideration (July 28, 1997)	117
Transcript of Hearing before U. S. District Court (August 1, 1997)	127
Government's Notice of Appeal and Certification (September 2, 1997)	137

TABLE OF CONTENTS—Continued

Volume II

	Page
District Court Order & Memorandum Granting in part and Denying in part Defendant's Motion to Suppress (July 1, 1997)	139
District Court Order & Memorandum Denying Government's and Defendant's Motion for Reconsideration (Aug. 4, 1997)	156
Circuit Court Opinion (Feb. 8, 1999)	162
Circuit Court Order Denying Appellee's Petition for Rehearing and Rehearing *en banc* (Apr. 1, 1999)	226
Circuit Court Order Granting Appellee's Motion To Recall and Stay the Mandate (Apr. 14, 1999)	227

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Criminal No. 97-159-A

UNITED STATES OF AMERICA,

v.

CHARLES THOMAS DICKERSON,
Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Defendant's Motion to Suppress is GRANTED at [sic] to his statements offered at the FBI Field Office on January 27, 1997, and items discovered during the search of his home that evening;

(2) Defendant's Motion to Suppress is DENIED as to the search of his Oldsmobile Ciera; and

(3) the clerk shall forward copies of this Order and Memorandum Opinion to counsel of record.

/s/ James C. Cacheris
United States District Judge

July 1, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

MEMORANDUM OPINION

This matter is before the Court on Defendant Charles Thomas Dickerson's Motion to Suppress. For the reasons set forth below, Defendant's Motion is GRANTED in part and DENIED in part.

Facts.

Defendant was arrested on January 27, 1997 and subsequently charged with Conspiracy to Commit Bank Robbery, three Counts of Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d), and three counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. 924(c). He now moves to suppress his confession and evidence seized during searches of his house and automobiles.

On January 24, 1997, a NationsBank in Alexandria, Virginia was robbed. Shortly thereafter, and prior to the occurrence of events germaine to this Motion, Federal Bureau of Investigation ("FBI") Special Agent Christopher Lawlor ("Agent Lawlor"), the lead agent on the case, learned that the robbery had been "committed with a large, silver, semi-automatic handgun and a black leather backpack . . . , that approximately $876 was taken in the robbbery, and that no dye pack or bait money was given to the robbers." Lawlor Aff. at ¶ 4. Moreover,

witnesses had seen one of the robbers, later identified as James Rochester ("Rochester"), leave the bank and get directly into a Oldsmobile Ciera ("Ciera") positively identified as belonging to Dickerson.

Working from the witnesses' description of the getaway car, including its tag number, Agent Lawlor and several other local and federal law enforcement agents and officers arrived at Dickerson's Takoma Park, Maryland apartment at approximately 5:30 on the afternoon of January 27, 1997. They identified the Ciera used in the robbery and a Chevrolet Caprice also registered to Dickerson parked nearby. A little over an hour later, the agents and officers knocked on Dickerson's door.

At this point, Agent Lawlor's version of events differs substantially from Dickerson's.

According to Agent Lawlor, only four officers and agents came into the apartment and, despite the fact that the officers and agents had been afforded over an hour to plan their encounter with a suspected armed robber in his own home, Agent Lawlor did not have his gun drawn. and "didn't expect one way or the other" whether his colleagues would have theirs drawn. Tr. at 27. After some delay, Dickerson opened the door and allowed the agents and officers in. The agents and officers then asked Dickerson if he would come with them to the station. Dickerson agreed, but asked if he could retrieve his coat from the bedroom. When Dickerson turned to get his coat from an adjoining room, Agent Lawlor and another agent followed him "for their safety." Tr. at 10.

As Dickerson picked up his coat from the bed, the agents observed money later determined to be $552 fall onto Dickerson's bed. Dickerson told the agents that the money consisted of gambling winnings from a recent trip to Atlantic City and put the money in his coat pocket.

The officers and agents in the house observed no other incriminating evidence or contraband. They asked Dickerson for permission to search the house, but he refused. He then accompanied the officers to the FBI field office in Washington, D.C.

According to Dickerson's account of events, about 10 agents and officers came to his apartment with their guns drawn, although only a few entered, including Agent Lawlor. Dickerson testified that the officers and agents entered uninvited. He further testified that he felt he had no choice but to accompany the officers to the station.

Once at the station, Dickerson was interviewed by Agent Lawlor and another agent. Initially, Dickerson denied any involvement in the robbery, admitting only that he had been in the vicinity of the bank when the robbery occurred.

At one point, Agent Lawlor left the interview room and called United States Magistrate Judge for the District of Maryland James E. Kenkel to obtain a search warrant for Dickerson's home. As probable cause for the warrant, Agent Lawlor described the circumstances of the robbery and the fact that the getaway car had been traced to Dickerson. In addition, Agent Lawlor noted that Dickerson, who had been behind on his rent, had just made a $1,350 payment to his landlord, and that Agent Lawlor had seen the $552 addressed earlier. Moreover, Agent Lawlor asserted that exigent circumstances existed because "Mr. Dickerson is not under arrest at this point, and is free to go home. Ah, should he go home, ah, we believe that is, that, ah, he could destroy evidence of the robbery. . . ." Tr. of Telephonic Aff. Judge Kenkel found "probable cause to believe at the residence there may be . . . evidence of . . . the bank robbery in question." *Id.* During the colloquy between Judge Kenkel and Agent Lawlor, there was no discussion whatsoever of what in

particular would be sought. Tr. at 25. The warrant itself only offered that there was reason to believe that "evidence of the crime of bank robbery" would be found at Dickerson's house.[1] The warrant was approved at 8:50 p.m.

At the hearing on this Motion, Agent Lawlor testified that when he talked to Judge Kenkel, Agent Lawlor knew that the $552 was no longer in Dickerson's residence, but was in fact at the station. Tr. at 24. In fact, Dickerson had already allowed Agent Lawlor to count, inspect, and seize the money. Tr. at 10-11. Agent Lawlor further testified that he had seen no other incriminating evidence and that "he had no way of knowing" what the searchers would find. Tr. at 25-26.

After obtaining the warrant, Agent Lawlor dispatched other agents and officers to conduct the search of Dickerson's house, instructing them to look for "evidence of the crime of bank robbery." Lawlor Aff. at ¶ 6. Agent Lawlor then returned to the interrogation room, and told Dickerson that his house was about to be searched. Tr. at 15. Dickerson then decided that he wanted to offer a statement. Tr. at 16. "At that point," Agent Lawlor testified, Dickerson was read his rights, waived them, and

---

[1] At the hearing, Agent Lawlor testified:

Question by AUSA Spencer: On the front, face sheet of the warrant, there's a section about the items to be seized or searched for. Who wrote the information in that section?
A: I did.
Q: Did you decide what words to put in there or did someone else decide?
A: No, someone else.
Q: Who was that?
A: The Judge.

Tr. at 15. There is nothing in the transcript of the telephonic application for the warrant to support Agent Lawlor's sworn testimony.

signed a rights-waiver form. That form was marked as being executed at 9:41 p.m. According to Agent Lawlor, Dickerson then offered the statement that is the subject of the present Motion.

Dickerson's account of events at the FBI Field Office materially differs only in that he asserts that he gave his statement before being read his rights and signing the rights-waiver form.

The subsequent search of Dickerson's home revealed the silver .45 caliber handgun allegedly used in the January 24 robbery, dye stained money and a bait bill from another robbery, and other evidence. Gov't. 2d Sup. Mem. at 6.

On March 28, 1997, Agent Lawlor obtained warrants to search each of the cars present at Dickerson's house. The affidavit attached to the warrant specified that items sought included:

a. A black leather backpack, and its contents;
b. Currency;
c. Clothing and disguises;
d. Items stained by dye from explosive dye-packs;
e. Firearms, ammunition, and pellet guns;
f. Money or cash straps;
g. Demand notes;
h. Carrying bags;
i. Photographs, in particular, photographs of co-conspirators;
j. Address books, Rolodexes, or other documents containing names of co-conspirators; and
k. Evidence of the disposition of cash obtained in bank or armed robberies.

From the Ciera identified by witnesses to the January 27 robbery, agents recovered a black leather backpack and

solvent used to clean dye-stained money. Nothing of note was recovered from the search of the Caprice, which will not be considered further.[2]

II.

Dickerson seeks to exclude statements he made to Agent Lawlor at the FBI field office and items recovered from the search of his home, asserting that government conduct violated rights protected by the Fourth and Fifth Amendments to the Federal Constitution.

A. Dickerson's Fourth Amendment Claim.

Since 1984, analysis of motions to suppress evidence allegedly obtained in violation of the Fourth Amendment is a two-step analysis. *See United States v. Leon*, 468 U.S. 897, 913 (1984). First, the Court considers whether a violation of the Fourth Amendment in-fact occurred. Second, if the Court finds a constitutional violation, the Court must determine if the law enforcement officers nonetheless acted in good faith. If the government prevails on either prong of this test, the evidence may not be suppressed. *Id.*; *see also Massachusetts v. Sheppard*, 468 U.S. 981, 990 n.6 (1984) (officer who applied for warrant, expressed questions about the warrant's validity, and conducted the ensuing search was reasonable in relying on a magistrate judge's assurances that apparently defective warrant was "sufficient in form and content"). Both determinations are questions of law. *See United States v. George*, 975 F.2d 72, 77 (2d Cir. 1992).

---

[2] Dickerson's challenge to the search of his Cierra does not detain the Court long. Even if the Court were to hold that all of Dickerson's statements were illegally obtained and that the search of his house was in violation of the Fourth Amendment, probable cause for search of the Ciera exists based solely on the admissions of James Rochester and the testimony of the witnesses who identified the cars. *See California v. Acevedo*, 500 U.S. 565 (1991).

1. The Warrant was Invalidly Vague.

In order to be valid under the Fourth Amendment, a search warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV. This provision was crafted as a bulwark against general warrants employed by British colonial officials. *Stanford v. Texas*, 379 U.S. 476, 481 (1965). A sufficiently particular warrant describes the items to be seized in such a manner that "nothing is left to the discretion of the officer executing the warrant." *Id.* at 485 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)).

In *Andresen v. Maryland*, the Supreme Court held valid a warrant seeking a long list of specified items "together with other fruits, instrumentalities, and evidence of crime at this (time) unknown." 427 U.S. 463, 482 n. 10. The crime charged in *Andresen* was a "complex real estate scheme" involving a specific piece of land. There, the Court carved out an exception to the particularity requirement so that "[t]he complexity of an illegal scheme may not be used as a shield. . . ." *Id.; see also United States v. Wuagneux*, 683 F.2d 1343, 1348-49 (11th Cir. 1982) (taking into account the "practical necessities" in assembling the "paper puzzle" incumbent on solving "white collar crime").

The *Andresen* exception does not apply here, for three reasons. First, the warrant in *Andresen* was sufficiently particular to get searchers headed in the right direction, focusing them on "evidence relating to 'the crime of false pretenses with respect to Lot 13T.'" Searchers here had no such guidance. Second, the crime charged here is a simple bank robbery, not a "complex scheme." Evidence of the crime of bank robbery could include many ordinary household items and personal effects that the government knew were not associated with this crime. Finally, while

the warrant in *Andresen* sought evidence the precise nature of which was unknowable at the time the warrant issued, Officer Lawlor and his colleagues knew the amount of cash taken and the description of the pistol and backpack used in the robbery before visiting Dickerson.

Nor is this case like *United States v. Robertson*, 21 F.3d 1030 (10th Cir. 1994), a car jacking case relied upon by the government, in which the Tenth Circuit upheld a warrant authorizing the seizure of four specific, easily distinguishable items "and other instrumentalities and fruits of the crime of armed car jacking." 21 F.3d at 1031. In *Robertson*, the victim "told the agent that the property missing from his car included those four items, but he could not recall and specifically describe the rest of his things, most of which were clothing." The Court held that

> even a "warrant that describes items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit." The agents tried to get a detailed description from [the victim] before seeking the warrant. However, [the victim] was distraught and could not specifically recall more than a few items. Most of his things were so commonplace that [the victim] never could have given the agent any distinguishing details about them. Furthermore, because an agent had already interviewed Robertson about the crime, Robertson probably would have removed the evidence if the agents had waited to see if [the victim] could better describe his property later.
>
> * * *
>
> Even if generic descriptions are necessary, however, "the fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circum-

> stances allow, and 'warrants are conclusively invalidated by their failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized."

Id. at 1033 (citations omitted).[3] Ultimately, the key to the court's ruling was that the challenged warrant "could not have given the agents any more guidance in determining what they could seize." *Id.*

Unlike his counterparts in *Robertson*, Agent Lawlor did not insure that the warrant specified the items that he and others in the government knew were used by the bank robbers, i.e., "a large silver, semi-automatic handgun and a black leather backpack," nor did the warrant give any hint of the amount of money taken from the bank, i.e. "approximately $876."[4] *See* Lawlor Aff. at 4. Accordingly, the government failed to "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow[ed]." *Id.* at 1033. Because "warrants are conclusively invalidated by their failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized," the warrant under which agents and officers searched Dickerson's residence was invalid as a matter of law. *See id.; see also United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980) ("It is settled law that generic classifications in a warrant are acceptable only when a more precise description is not possible.")

[3] The government also relies on this passage in an attempt to invoke an "exigent circumstances" exception to the particularity requirement. Along these lines, Agent Lawlor told Magistrate Judge Kenkel that "Our reasons for the exigent circumstances for the, ah, search is that, ah, the, ah, Mr. Dickerson is not under arrest at this point and is free to go home." It strains credibility to believe that the FBI would simply release a person who (1) owns a car used in a bank robbery; (2) admits that he was in the vicinity of the robbery in question at the time it was committed; (3) admits that a passenger in his car engaged in behavior that witnesses attribute to the robber; (4) is subsequently discovered with a large sum of cash; and (5) who agents "believe . . . could destroy evidence" of the robbery. Agent Lawlor was not credible in his testimony before this Court, and apparently was less than forthright with the magistrate judge, as well.

[4] Similarly, the warrant did not even imply these factors, as it might have by specifying "evidence of the crime of bank robbery with respect to the robbery of the Alexandria NationsBank on January 24, 1997." Such language would have brought the warrant closer to the form found acceptable by the Supreme Court in *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

2. The Officers Executing the Warrant Acted in Bad Faith.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that evidence seized by officers acting under an invalid warrant may not be excluded solely based on the invalidity of the warrant if the officers acted in "objectively reasonable reliance" on the apparent validity of the warrant. However,

> [t]he *Leon* Court also outlined four situations in which an officer's reliance on a warrant would not be reasonable:
>
> * * *
>
> (4) the warrant was so facially deficient, by failing to particularize the . . . things to be seized, that the executing officers cannot reasonable [sic] presume it to be valid.

United States v. Hyppolite, 65 F.3d 1151, 1156 (4th Cir. 1995), (citing *Leon*, 468 U.S. at 923.)

In *Massachusetts v. Sheppard*, 486 U.S. 981 (1984), the companion case to *Leon*, the Supreme Court held that an officer who conducted a search relying on a facially invalid warrant nonetheless acted in good faith. In *Sheppard*, the officer actually executing the search was the

same officer who had sworn out an affidavit particularizing the items sought. The Court held that because the same officer had conducted the search and limited the search to the items in the affidavit, and ignored the impermissibily broad scope of the warrant as issued, the seized items should not be excluded at trial.

The warrant in question here differs in three fatal respects from the situation in *Sheppard*. First, unlike the detective in *Sheppard*, Agent Lawlor neither questioned the magistrate judge regarding the apparent overbreadth of the warrant, nor did he receive assurances from the judge that the objectively invalid warrant was valid as issued. Second, and perhaps more importantly, Agent Lawlor neither sought to attach an affidavit to the warrant nor even told the magistrate judge what would be sought.[5] Finally, Agent Lawlor remained at the station while other officers and agents executed the search warrant. He was therefore unable to focus their search based on his personal knowledge of the case.[6] Accordingly, for each of these reasons, the agents and officers who executed this

---

[5] The closest Agent Lawlor came to informing the magistrate judge what would be sought was including in his narrative that the robber "displayed a handgun and opened a bag." No further statements by Agent Lawlor either identified these items with any particularity or linked them in any way to the premises to be searched.

[6] In *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990), the court highlighted the importance for the purposes of *Leon* of having the officer who applies for the warrant actually conduct the search:

> This fact is significant because in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position would have possessed.

911 F.2d at 78.

warrant can not be said to have acted with the objective reasonableness required by *Leon*. *See United States v. Towne*, 997 F.2d 537, 549 (9th Cir. 1993) (reliance on a warrant is objectively unreasonable if the vagueness of the warrant "leaves [searchers] guessing at their task").

B. Dickerson's Fifth Amendment Claim.

Dickerson's claim that his Fifth Amendment rights were violated requires the Court to determine two issues: 1) whether Dickerson was in custody when he was interrogated and 2) if so, whether he was read the warnings required by *Miranda v. Arizona* and its progeny.

1. Dickerson was in Custody.

The Supreme Court

> held in *Miranda* that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. Statements elicited in noncompliance with this rule may not be admitted for certain purposes at a criminal trial. An officer's obligation to administer *Miranda* warnings attaches, however, only where there has been such a restriction on a person's freedom as to render him in custody. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or a restraint on the freedom of movement of the degree associated with a formal arrest.

Stansbury v. California, 511 U.S. 318, 321 (1994) (citations and quotations omitted). This "ultimate inquiry" turns not on the officers' intentions or perceptions, but on "how a reasonable man in the suspect's shoes would have understood his situation." *Id.* at 324 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)); *see United States v. Jones*, 818 F.2d 1119, 1123 (4th Cir. 1987). The law in this Circuit is that neither the fact that an interrogation takes place in a police station, nor that the suspect was given a ride to the station by police is, by itself, enough on which to base a finding that a person was in custody. *See United States v. Howard*, 1997 WL 318068 (4th Cir. June 13, 1997); *Jones*, 818 F.2d at 1123.

In this case, several armed police officers and federal agents entered Dickerson's home after dark and asked him to accompany them to the station.[7] They then took

[7] This Court lacks the luxury enjoyed by the district court in *Howard*, where that court was able to rely on the agent's testimony and discount that of the defendant. Here, both the content of Agent Lawlor's testimony, which was impeached by the government's own exhibits, and his demeanor lacked credibility. *See United States v. Howard*, 1997 WL 318068 at *2 (4th Cir. June 13, 1997). For example, Agent Lawlor dodged questions about whether his colleagues had their guns drawn. It is simply not credible for a well-trained Special Agent of the FBI to assert that, having had over an hour on-scene to plan a confrontation with a suspect in an armed bank robbery after arriving at the suspect's residence, and then another few minutes immediately outside his door after the suspect stalled when learning that they were peace officers, he "didn't expect one way or the other" about whether his colleagues would have their weapons drawn. Tr. at 27. Because of Agent Lawlor's untruthfulness, and the government's successful impeachment of much of Dickerson's testimony, the Court has pieced together a picture of the events of January 27, 1997 based on the uncontroverted documentary evidence and the Court's assessment of the relative veracity of Dickerson and Agent Lawlor regarding individual disputed factual issues. It is this first-hand assessment of witness credibility, based on demeanor, voice inflection and a

Dickerson across the state line, on a ten-mile ride through the District of Columbia to the FBI field office near Buzzard's Point, in Southwest D.C. He was neither handcuffed, nor arrested, nor told he was not free to go. On the other hand, he was not told that he was free to go. After the interrogation described above, and without leaving the presence of the officers and agents, he was arrested.

The Court holds that Dickerson was in custody when taken from his residence in the dark of a winter night by armed officers and agents, driven across state lines, interrogated at a location ten miles distant from his home, on the far side of a large and dangerous urban center. Under these circumstances, Dickerson's "freedom of movement" was as restricted as if he had been arrested—he could either stay in the warmth and light of the FBI field office or be cast off into the dark and danger of the Washington night.[8] Moreover, the only circumstance of Dickerson's encounter with the agents that night which would have changed had he been arrested at the outset rather than the end is that he would have been read his rights earlier.

totality of other factors not well reflected by an inanimate record, for which the district court is uniquely suited. *United States v. Oregon State Medical*, 343 U.S. 326, 339 (1952); *see also Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) ("A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (quotations and citations omitted)).

[8] The government makes much of the fact that Dickerson apparently knew that he was empowered to refuse permission to search his house when first asked, and thus must have known that he was free to refuse to accompany the armed officers to the field office. The Court is reluctant to convert the exercise of one's rights protected by the Fourth Amendment into a waiver of those protected by the Fifth.

To allow law enforcement officers to circumvent *Miranda* by merely delaying their inevitable arrest of a suspect until he or she offers an uncounseled and unwarned confession would ultimately gut the intent of *Miranda* and its progeny.[9]

2. Dickerson was not timely advised of his rights.

It is undisputed that, at 9:41 p.m. on January 27, 1997, Dickerson read and signed a right's waiver form. The question before the Court is whether he read and signed the form before or after making his incriminating statements.[10]

Agent Lawlor testified as follows:

> Q. (by AUSA) What did you do after you got the warrant?
>
> A. I notified agents who were in the area that we had a warrant, and I went back and told Mr. Dickerson that we were about to search his apartment.
>
> * * *
>
> Q. What was the defendant's reaction when you told him there was a warrant to search his apartment?
>
> A. He decided that he wanted to talk to me again.

---

[9] Courts have also emphasized that the ultimate termination of a suspect's encounter with the police somehow reaches back to color how "a reasonable man in the suspect's shoes would have understood his situation." *See Stansbury v. California*, 511 U.S. 318, 324 (1994) (citations omitted); *see also United States v. Jones*, 818 F.2d 1119, 1123 (4th Cir. 1987) ("At the conclusion of the interviews, appellees left the police station together and remained free until the indictment was filed approximately one month later."). Dickerson was arrested at the end of his interview.

[10] It is also not disputed that statements made prior to the issuance of the warrant were unwarned. Accordingly, those statements are inadmissible for the purposes prohibited by *Miranda*.

> Q. At that point, did you read him his rights?
> A. Yes, I did.

Tr. at 16. On cross examination, Agent Lawlor tried to stretch the time between his getting the warrant and his notice to the Defendant to "several minutes." Even accepting that he didn't directly tell Dickerson and "at that point" Mirandize him, Agent Lawlor's testimony is in direct conflict with the documentary evidence, which shows that the warrant issued at 8:50 p.m., and Dickerson's testimony that he was Mirandized at the end of "a half hour" long interview. Based on the documentary evidence and the Court's assessment of the credibility of the defendant and Agent Lawlor, the Court finds that Dickerson was not advised of his *Miranda* rights until after he had completed his statement to the government. Accordingly, those statements will be excluded from use during the government's case-in-chief.

An appropriate Order shall issue.

/s/ James C. Cacheris
United States District Judge

July 1, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Government's Motion to Reconsider is DENIED;

(2) Defendant's Motion for Reconsideration is DENIED; and

(3) the clerk shall forward copies of this Order and Memorandum Opinion to counsel of record.

/s/ James C. Cacheris
United States District Judge

August 4, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

[Caption Omitted in Printing]

MEMORANDUM OPINION

This matter is before the Court on cross Motions of Defendant and the United States which ask this Court to reconsider its Order of July 1, 1997 granting in part Defendant Charles Thomas Dickerson's Motion to Suppress. For the reasons set forth below, both Motions are DENIED.

Facts.

Defendant was arrested on January 27, 1997 and subsequently charged with Conspiracy to Commit Bank Robbery, three Counts of Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d), and three counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. 924(c). On July 1, 1997, this Court granted in part Dickerson's Motion to Suppress certain evidence. Specifically, the Court held that Dickerson's confession was elicited in violation of his rights protected by the Fifth Amendment, and that a search of his home was conducted in violation of rights protected by the Fourth Amendment. The Court's holding was based in part on its finding that Dickerson's in-court testimony was more credible than that of FBI Special Agent Christopher Lawlor.

In its Motion for Reconsideration, the Government introduces new affidavits that seek to undermine both the

Court's holding that Dickerson's rights were violated and the Court's finding that Agent Lawlor's testimony lacked credibility.[1]

Standard of Review.

As there is no provision in the Federal Rules of Criminal Procedure governing motions for reconsideration, the Court will be guided by the standard set in the Civil Rules. Federal Rule of Civil Procedure 59(e) allows "an aggrieved party to file a motion to alter or amend a judgment within ten days of its entry." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). "[C]ourts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law." *Id.* In examining the motion to reconsider, the Court is mindful of the fact that "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). "In order to support a motion for reconsideration, 'the movant is obliged to show not only that . . . evidence was newly discovered or unknown to it until after the

[1] In support of his Motion to Reconsider, Dickerson argues that the Court should suppress evidence obtained during the search of Dickerson's Oldsmobile Ciera, the car identified by witnesses as having been used in the Alexandria robbery. The Court based its ruling on both the eyewitness accounts and testimony of James Rochester. Dickerson now argues that Rochester's testimony is fruit of a tree tainted by Dickerson's constitutionally invalid confession. In light of the Fourth Circuit's ground breaking decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997), this argument is without merit. Moreover, the search of the Ciera is sufficiently supported by the eyewitness accounts and the inevitable discovery doctrine. *See United States v. Nix*, 467 U.S. 431 (1984). Accordingly, Defendant's Motion for Reconsideration is DENIED.

hearing, but also that it could not with reasonable diligence have discovered or produced such evidence at the hearing.' " *Boryan v. U.S.*, 884 F.2d 767, 771 (4th Cir. 1989) (quoting *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985)). Therefore, evidence brought to the Court's attention which was available to the movant prior to an entry of judgment is "not a basis for granting a motion for reconsideration as a matter of law." *Id.*

It is within the sole discretion of the Court as to whether the granting of a motion to reconsider is appropriate. *Id.* at 771. A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court "rethink what the Court ha[s] already thought through—rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

Analysis.

In the present Motion, the Government has done little more than present new evidence without even arguing that the evidence now set forth was unavailable at the time of the hearing. This failure is fatal to the Motion. At the August 1, 1997 hearing of this Motion, the Government indicated that the Assistant United States Attorney had very little time to prepare Agent Lawlor for his earlier testimony;[2] that the Government anticipated that Agent

[2] Defendant's original Motion to Suppress was filed on May 19, 1997. The Government responded on May, 23, 1997, and supplemented its response on May 29, 1997. The hearing was held on May 30, 1997. The Government filed a supplemental memorandum on June 3, 1997.

At the hearing of this Motion, the Government affirmed the Court's observation that "this is one of those deals where they threw the case at [the AUSA] at 4:00 on the day before [the hearing]."

Lawlor's testimony would sufficiently summarize the testimony of the other agents, whom the Government admits were available to testify but whom it chose not to present; and that Agent Lawlor did not review prior to the hearing the documentary evidence that ultimately undermined his testimony. According to the Government, "[Agent Lawlor] didn't obviously look at those documents, and he obviously wouldn't lie about it when it's documented like that. So I think that was just an error on his part." The Court does not sit to clean up a party's failure properly to gather, prepare, present, or argue its evidence.[3]

Aside from presenting incompetent evidence, the Government asks the Court to re-evaluate Agent Lawlor's testimony in light of the fact that he apparently broke his neck in a 1996 hockey accident and is thus unable to turn his head. The Court's assessment of Agent Lawlor's veracity was based on the content of his testimony and the cadence, tone, and inflection of his voice, and was aided by defense counsel's adept impeachment. The Court assumes that none of these factors was affected by his disability.[4] The district court is uniquely positioned to

[3] The Court notes that some of the evidence now brought forward more closely corroborates Dickerson's account of events than Special Agent Lawlor's. For example, Agent Wenko asserts that he had his weapon drawn when he confronted Dickerson. That is the material point that Dickerson's counsel was trying to elicit from Agent Lawlor at the hearing and about which Agent Lawlor denied knowledge. In addition, the Government's Motion misses the point regarding Agent Lawlor's assertion to Magistrate Judge Kenkel that a telephonic warrant (and an incomplete one at that) was necessary because Dickerson soon would be free to go home and destroy evidence. The Government clearly is correct in arguing that police are not required to arrest any suspect for whom they have probable cause. However, the Government may not use its volitional decision not to arrest as the basis for a claim of exigent circumstances.

[4] The Government begins its plea for reconsideration by asserting that "[a]t stake here is not only our ability to bring Dickerson to book for multiple armed robberies, but also quite possibly an agent's career." More correctly, what is at stake here is the liberty of a citizen who is presumed to be innocent and whose constitutionally protected rights were breached by the government. At the end of the day, and regardless of the outcome of the trial of this case, Agent Lawlor will not spend the next several years in prison—Dickerson may.

judge the credibility of a witness before it based on the witness's testimony and all of the evidence properly before it. However, the Court may only make this determination based on evidence that is actually presented.[5]

Because the Government has not proffered any new and heretofore unavailable evidence supporting reversal of this Court's July 1, 1997 Order, the Government's Motion for Reconsideration is DENIED. Because it finds no support in the law, Defendant's Motion for Reconsideration also is DENIED.

An appropriate Order shall issue.

/s/ James C. Cacheris
United States District Judge

August 4, 1997
Alexandria, Virginia

[5] While the Government's failure to properly bring its case may be unfortunate for both Agent Lawlor and the immediate interests of justice, the Court owes a greater and abiding duty to protect the judicial processes that in turn protect us all. The Court may not abandon this duty in deference to "its own sense of justice." *See United States v. Perkins*, 108 F.3d 512, 515 (4th Cir. 1997).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4750

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

CHARLES THOMAS DICKERSON,
Defendant-Appellee.

WASHINGTON LEGAL FOUNDATION;
SAFE STREETS COALITION,
Amici Curiae.

Argued: January 30, 1998
Decided: February 8, 1999

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria,
James C. Cacheris, Senior District Judge. (CR-97-159-A)

Before WILLIAMS and MICHAEL, Circuit Judges, and KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Williams wrote the opinion, in which Senior Judge Kiser joined. Judge Michael wrote an opinion concurring in part and dissenting in part.

OPINION[*]

WILLIAMS, Circuit Judge:

In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda* governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.

I.

On January 27, 1997, Charles T. Dickerson confessed to robbing a series of banks in Maryland and Virginia. Dickerson was subsequently indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), three counts of bank robbery in violation of 18 U.S.C.A. [Page 3] § 2113(a) & (d) (West Supp. 1998), and three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c)(1) (West Supp. 1998). Shortly thereafter, Dickerson moved

---

[* Bracketed page designations within this opinion refer to the corresponding location of text in the original slip opinion.]

to suppress his confession. Although the district court specifically found that Dickerson's confession was voluntary for purposes of the Fifth Amendment, it nevertheless suppressed the confession because it was obtained in technical violation of *Miranda*.[1]

In ruling on the admissibility of Dickerson's confession, the district court failed to consider § 3501, which provides, in pertinent part, that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is evident that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court. Thus, if Congress possessed the authority to enact § 3501, Dickerson's voluntary confession is admissible as substantive evidence in the Government's case-in-chief.

Congress enacted § 3501 as a part of the Omnibus Crime Control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994), the Court has never considered whether the statute overruled *Miranda*, *see Davis v. United States*, 512 U.S. 452, 457 n.* (1994). Indeed, although several lower courts have found that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, *see United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975); *United States v. Rivas-Lopez*, 988 F. Supp.

[1] The district court also suppressed the physical evidence obtained during the search of Dickerson's apartment because the warrant was not sufficiently particular in describing the items to be seized. Finding that the warrant was sufficiently particular in describing the items to be seized, *see post* part IV.A, or, in the alternative, that the officers executing the warrant acted in good faith, *see post* part IV.B, we reverse that ruling also.

1424, 1430-36 (D. Utah 1997), no Administration since the provision's enactment has pressed the point, *see Davis*, 512 U.S. at 463-64 (Scalia, J., concurring) (noting [Page 4] that "the provision has been studiously avoided by every Administration . . . since its enactment more than 25 years ago"); *see also* U.S. Dep't of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986) (discussing "[t]he abortive implementation of § 3501" after its passage in 1968). In fact, after initially declining to take a position on the applicability of § 3501, *see Davis*, 512 U.S. at 457 n.*, the current Administration has now asserted, without explanation, that the provision is unconstitutional, *see* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997).

Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. *See Davis*, 512 U.S. at 465 (Scalia, J., concurring). In addition to "caus[ing] the federal judiciary to confront a host of *Miranda* issues that might be entirely irrelevant under federal law," *id.*, Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced—during an era of intense national concern about the problem of run-away crime—the acquittal and the nonprosecution of many dangerous felons," *id.* This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. *See United States Nat'l Bank of Or.*

v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 445-48 (1993). Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

Determining whether Congress possesses the authority to enact § 3501 is relatively straightforward. Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. *See Carlisle v. United States*, 517 U.S. 416, [Page 5] 426 (1996); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959). Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. Clearly it is not. At no point did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, 384 U.S. at 467, disclaimed any intent to create a "constitutional straitjacket," *id.*, referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Since deciding *Miranda*, the Supreme Court has consistently referred to the *Miranda* warnings as "prophylactic," *New York v. Quarles*, 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). We have little difficulty concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional. As a consequence, we hold that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*.

II.

Because of the unique posture of this case, *i.e.*, an interlocutory appeal from the denial of a motion to reopen a suppression hearing, and the significant legal questions raised therein, we have set forth the factual background and the procedural history in painstaking detail. Although rather lengthy, we believe that it is helpful in understanding the important legal issues that must be addressed.

On January 4, 1997, an individual using a silver semiautomatic handgun and carrying a black leather bag robbed the First Virginia Bank in Old Town, Alexandria, Virginia, of approximately $876. An eyewitness saw the robber exit the bank, run down the street, and get into a white Oldsmobile Ciera with District of Columbia license plate number D5286. Within seconds, the robber exited the car, placed something in the trunk, and then re-entered the car on the passenger side. The car then drove away.

The subsequent investigation into the bank robbery revealed that the getaway car was registered to Charles T. Dickerson of Takoma [Page 6] Park, Maryland. On January 27, 1997, approximately ten FBI agents and an Alexandria police detective (the agents) traveled to Dickerson's Takoma Park address. Upon arrival, the agents noticed a white Oldsmobile Ciera with D.C. license plate number D5286 parked on the street in front of Dickerson's apartment. Special Agent Christopher Lawlor knocked on Dickerson's door and identified himself. After some delay, Dickerson opened the door. Special Agent Lawlor informed Dickerson that the agents were investigating a bank robbery.

Although the parties dispute whether the agents had consent to enter Dickerson's apartment, there is no dispute that several agents did, in fact, do so. After a short conversation, Special Agent Lawlor asked Dickerson if he would accompany them to the FBI Field Office in Washington, D.C. Dickerson agreed,[2] but requested that he be allowed to retrieve his coat from his bedroom. As Dickerson picked up his coat, Special Agent Lawlor noticed a large amount of cash on the bed. After placing the money in his coat pocket, Dickerson told the agents that it was gambling proceeds from Atlantic City. After denying the agents' request to search his apartment, Dickerson rode with the agents to the FBI Field Office. Dickerson was not formally placed under arrest and was not handcuffed. Several agents, including Agent Lawrence Wenko, remained in the vicinity of Dickerson's apartment.

At the FBI Field Office, Dickerson was interviewed by Special Agent Lawlor and Detective Thomas Durkin of the Alexandria Police Department. Dickerson denied any involvement in the robbery, but admitted that he had driven to Old Town on the morning in question to look at a restaurant. While in the vicinity of the First Virginia Bank, Dickerson claims that he ran into an old friend named Terrence, who asked for a ride to Suitland, Maryland. Dickerson agreed, and drove Terrance to Suitland, where he dropped Terrance off near a liquor store.

Special Agent Lawlor left the interview room and called United States Magistrate Judge James E. Kenkel to obtain a warrant to search Dickerson's apartment. Based upon the tape-recorded conversation [Page 7] between Special

---

[2] Dickerson testified at the suppression hearing that he did not feel he had a choice about whether to accompany the agents to the field office.

Agent Lawlor and Judge Kenkel, it is undisputed that Special Agent Lawlor described the circumstances of the robbery, including that the robber used a handgun, carried a bag, requested unmarked bills, and left the scene in a car registered to Dickerson. In addition, Special Agent Lawlor noted that Dickerson had over $550 in cash when picked up, had just that day paid his landlord $1350 to cover back rent, and had admitted that he was near the bank at the time of the robbery. Finally, Special Agent Lawlor explained that he was seeking a telephonic warrant because Dickerson was not under arrest and could easily go home and destroy any evidence of the bank robbery.

Based upon Special Agent Lawlor's sworn statement, Judge Kenkel stated that he was convinced "that there is probable cause to believe at that residence there may be . . . evidence of . . ., the bank robbery in question." (J.A. at 69.) In the section of the warrant used to identify the property to be seized, Special Agent Lawlor wrote: "Evidence of the crime of bank robbery." (J.A. at 66.) In the section of the warrant used to identify the time issued, Special Agent Lawlor wrote: "8:50 p.m."[3] (J.A. at 66.) Special Agent Lawlor then called Agent Wenko, who had remained in the vicinity of Dickerson's apartment, to inform him that a warrant had been issued authorizing the agents to search Dickerson's apartment for evidence of the First Virginia Bank robbery. Immediately after being notified about the warrant, Agent Wenko and a team of agents proceeded to search Dickerson's apartment.

---

[3] Because the warrant was obtained over the telephone, Judge Kenkel was not able to sign the warrant personally. Instead, Judge Kenkel instructed Special Agent Lawlor to sign the Judge's name, followed by a slash and Special Agent Lawlor's name, on the line used to identify the name of the judicial officer authorizing the warrant.

After returning to the interview room, Special Agent Lawlor told Dickerson that agents were about to search his apartment. At some point thereafter, Dickerson informed Special Agent Lawlor and Detective Durkin that he wished to make a statement. In his statement, Dickerson admitted to being the getaway driver in a series of bank robberies. Dickerson then identified Jimmy Rochester as the actual bank robber. Of particular importance to this case, Dickerson [Page 8] told the agents that on January 24, 1997, the pair drove to Old Town, Alexandria. Dickerson admitted that he stopped the car near the First Virginia Bank, that Rochester got out of the car, that Rochester returned a short while later and placed something in the trunk, that Rochester got back in the car, and that the pair drove away. Dickerson also told the agents that Rochester gave him a silver handgun [4] and some dye-stained money that Rochester feared the police might find in his apartment. Following these statements, Dickerson was placed under arrest.

As a result of Dickerson's confession, Rochester was apprehended by the police and placed under arrest. At that time, Rochester admitted to robbing eleven banks in Georgia, three banks in Virginia (including the First Virginia Bank in Old Town, Alexandria), four banks in Maryland, and an armored car in Maryland. Of particular importance here, Rochester stated that Dickerson was his getaway driver in each of the Maryland and Virginia bank robberies.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves. The agents also found a small quantity of drugs in plain

[4] Dickerson told Special Agent Lawlor and Detective Durkin that he had the handgun in question in his hand when the agents knocked on the door of his apartment.

view. A subsequent warrant-authorized search of Dickerson's Oldsmobile Ciera produced a black leather bag and solvent used to clean dye-stained money.

Based upon his confession, Rochester's statements, and the aforementioned physical evidence discovered during the searches of his apartment and car, Dickerson was indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), on three counts of bank robbery in violation of 18 U.S.C.A. § 2113(a) and (d) (West Supp. 1998), and on three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c)(1) (West Supp. 1998). [Page 9]

On May 19, 1997, Dickerson filed a motion to suppress (1) the statements he made at the FBI Field Office; (2) the evidence found as a result of his statements; (3) the physical evidence obtained during the search of his apartment; and (4) the physical evidence obtained during the search of his car. The Government submitted a brief in opposition to the motion to suppress. Several days later, the Government supplemented its brief in opposition. A hearing on the motion to suppress was held in the United States District Court for the Eastern District of Virginia on May 30, 1997.

At the suppression hearing, the Government relied exclusively upon the testimony of Special Agent Lawlor. Among other things, Special Agent Lawlor testified that Dickerson was read (and waived) his rights under *Miranda* prior to his confession. Of particular importance here, Special Agent Lawlor testified that Dickerson confessed "shortly after" he obtained the warrant to search Dickerson's apartment. In contrast, Dickerson testified that he confessed prior to being read (and waiving) his *Miranda* rights and about thirty minutes after being in-

formed about the warrant to search his apartment. The advice-of-rights form indicates that Dickerson waived his *Miranda* rights at 9:41 p.m. (J.A. at 72.) After the hearing, the district court asked the parties to submit supplemental briefs in support of their respective positions. The Government filed a supplemental memorandum on June 3, 1997.

On July 1, 1997, the district court issued an Order and Memorandum Opinion. The district court, among other things, suppressed Dickerson's statement implicating himself and Rochester in the First Virginia Bank robbery, finding that it was made while he was in police custody,[5] in response to police interrogation, and without the necessary *Miranda* warnings. In so holding, the district court found that Dickerson's in-court testimony was more credible than that of Special Agent Lawlor. This finding rested, in part, upon the fact that Special Agent Lawlor's testimony—that he read Dickerson his *Miranda* warnings "shortly after" obtaining the warrant—was contradicted by the warrant (issued at "8:50 p.m.") and the advice-of-rights [Page 10] form (executed at "9:41 p.m."). Because the documentary evidence undermined Special Agent Lawlor's credibility[6] (and supported [Page 11] Dickerson's testimony, *i.e.*, he was read his *Miranda* rights about thirty minutes after being told about the warrant), the district court found that "Dickerson was not advised of

[5] The Government does not challenge on appeal the district court's finding that Dickerson was in police custody for *Miranda* purposes when he was initially brought to the FBI Field Office.

[6] The documentary evidence, which clearly contradicted Special Agent Lawlor's testimony, was not the only reason the district court gave for finding that Special Agent Lawlor's testimony lacked credibility. First, Special Agent Lawlor testified that when he knocked on Dickerson's door he did not have his gun drawn and "didn't expect one way or the other" whether his colleagues would have their guns drawn. The district court found it "simply not credible for a well-trained Special Agent of the FBI to assert that" he did not expect his colleagues to have their weapons drawn when confronting a suspect in an armed bank robbery. (J.A. at 95 n.7.) Second, Special Agent Lawlor told Judge Kenkel that a telephonic warrant was necessary because Dickerson was not under arrest and could easily go home and destroy any evidence of the bank robbery. The district court concluded that "[i]t strains credibility to believe that the FBI would simply release" Dickerson. (J.A. at 90 n.3.) Third, Special Agent Lawlor testified that Judge Kenkel instructed him to write "evidence of the crime of bank robbery" in the section of the warrant used to identify the property to be seized. The district court found "nothing in the transcript of the telephonic application for the warrant to support" this testimony. (J.A. at 84 n.1.)

Although the diistrict court is uniquely suited for assessing witness credibility, *see United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 339 (1952), the aforementioned credibility determinations were, as the district court acknowledged, not based on the cadence, tone, or inflection of Special Agent Lawlor's voice. Nor, for that matter, were they based on any other factor that would be difficult to evaluate on appeal. Instead, they were based on the content of his testimony. As a result, we are as uniquely suited for assessing these particular findings as the district court.

We cannot say that Special Agent Lawlor's explanation for seeking a telephonic warrant strains credibility. Although the agents had probable cause to arrest Dickerson, there is no requirement that the police arrest a suspect the very moment that probable cause is established. Indeed, there are legitimate law enforcement reasons not to do so. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 791 (1977) (noting that there are legitimate reasons not to arrest a suspect the moment probable cause is established); *United States v. Jones*, 18 F 3d 1145, 1155 (4th Cir. 1994) (recognizing that need to delay arrests even after probable cause is established). As such, we do not believe, as the district court seemingly suggests, that a telephonic warrant was improperly obtained in this case, *see* Fed. R. Crim. P. 41(c)(2) (authorizing telephonic warrants), or that Special Agent Lawlor was untruthful when he testified that the agents did not intend to arrest Dickerson without additional evidence.

We also cannot say that "nothing" in the transcript of the telephonic application supports Special Agent Lawlor's testimony that Judge Kenkel instructed him to write "evidence of the crime of bank robbery" in the section of the warrant used to identify the property to be seized. An examination of the transcript reveals that Judge Kenkel instructed Special Agent Lawlor on what to

his *Miranda* rights until after he had completed his statement to the government." (J.A. at 98.)

Although the district court suppressed the statement obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, *e.g.*, the statement made by Rochester identifying Dickerson as the getaway driver. The district court, relying upon this Court's decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997), noted that evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Because Dickerson's statement was voluntary under the Fifth Amendment, the district court concluded that the evidence found as a result thereof was admissible at trial.

The district court did, however, suppress the physical evidence discovered during the search of Dickerson's apartment on January 27, 1997. The district court concluded that the warrant was insufficiently particular in describing the items to be seized. Moreover, the district court concluded that the good-faith exception to the exclusionary rule was inapplicable because the agents "[e]xecuting the [w]arrant [a]cted in [b]ad [f]aith" by relying upon a warrant that was so facially deficient. (J.A. at 91.) [Page 12]

Finally, the district court denied Dickerson's motion to suppress the evidence discovered in the trunk of his car. The district court found that the warrant to search Dickerson's car, unlike the warrant to search his apartment,

write in virtually every section of the warrant. Although Judge Kenkel did not specifically tell Special Agent Lawlor what to write in the section in question, he did state that there was probable cause to search Dickerson's apartment for "evidence of . . . the bank robbery in question." (J.A. at 69.)

was sufficiently particular in describing the items to be seized.[7] Moreover, the district court found that the search of the car was supported by the eyewitness accounts of the bank robbery.

On July 15, 1997, the Government filed a motion asking the district court to reconsider its Order suppressing the statements made by Dickerson at the FBI Field Office and the physical evidence found during the search of Dickerson's apartment. The Government's motion included affidavits from Detective Durkin and Agent Wenko, and a statement written by Dickerson while at the FBI Field Office. In addition, the Government argued that because Dickerson's statements were voluntary, they were nonetheless admissible under the mandate of 18 U.S.C.A. § 3501 (West 1985).

Detective Durkin, who was in the interview room with Dickerson at all times, stated in his affidavit that "Dickerson was read his [Page 13] *Miranda* rights before he made th[e] statements" implicating himself and Rochester in the First Virginia Bank robbery. (J.A. at 121.) Detec-

[7] An affidavit attached to the warrant identified the following items:

a. A black leather backpack, and its contents;
b. Currency;
c. Clothing and disguises;
d. Items stained by dye from explosive dye-packs;
e. Firearms, ammunition, and pellet guns;
f. Money or cash straps;
g. Demand notes;
h. Carrying bags;
i. Photographs, in particular, photographs of co-conspirators;
j. Address books, Rolodexes, or other documents containing names of co-conspirators; and
k. Evidence of the disposition of cash obtained in bank or armed robberies.

(J.A. at 85-86.)

tive Durkin explained that after Special Agent Lawlor returned to the interview room to announce that they were going to search Dickerson's apartment, Special Agent Lawlor immediately departed. According to Detective Durkin, it was not until Special Agent Lawlor returned some time later that they read Dickerson his *Miranda* warnings. In fact, Detective Durkin testified that when Dickerson was read his *Miranda* rights he still denied any involvement in the bank robbery. According to Detective Durkin, it was not until Dickerson was told that agents had found a bait bill from a bank robbery in his apartment that he decided to confess.

Attached to Detective Durkin's affidavit was a hand-written statement that Dickerson made while at the FBI Field Office in which he stated that he "was read [his] rights at 7:30 [p.m.]" [8] (J.A. at 123.) In addition, Dickerson wrote in the statement that he knew "nothing [about] the bank robbery" in question. (J.A. at 123.) Thus, according to his own hand-written note, Dickerson was read his *Miranda* warnings prior to implicating himself and Rochester in the First Virginia Bank robbery.[9] [Page 14]

---

[8] Although 7:30 p.m. does not correspond with the time that either Detective Durkin or Special Agent Lawlor gave for when Dickerson was read his *Miranda* rights, Detective Durkin explained in his affidavit that when Dickerson wrote 7:30 p.m., he "specifically recall[ed] thinking that Dickerson had no idea what time it was." (J.A. at 121.) In any event, the hand-written statement does correspond with the sequence of events that is so crucial to this appeal. Specifically, the statement corroborates the agents' position that Dickerson was read his *Miranda* warnings prior to his confession.

[9] Dickerson's hand-written statement reads, in pertinent part, as follows:

> I was read my rights at 7:30 [b]ut I was here at 5:30. I talked to the two Detectives . . . [for] two and a half hours and then was asked to take a polygraph test. I declined because after two hours I had knowledge of the bank robbery. I told them I know nothing of the bank robbery that happened Friday. Befor[e] today I didn't have any knowle[dge] of the bank robbery.

(J.A. at 123.)

Finally, Agent Wenko's affidavit contradicted, among other things, the district court's finding that the agents who executed the search of Dickerson's apartment acted in bad faith. Agent Wenko, who was the lead agent during the search of Dickerson's apartment, stated that he was familiar with the specifics of the bank robbery in question and knew what specific evidence to look for. In addition, Agent Wenko stated that he had been investigating bank robberies for seven years and was very familiar with the type of evidence customarily associated with bank robberies, *e.g.*, guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves.

On August 4, 1997, the district court denied the Government's motion for reconsideration. *See United States v. Dickerson*, 971 F. Supp. 1023 (E.D. Va. 1997). Noting that no provision in the Federal Rules of Criminal Procedure governed motions for reconsideration, the district court used the standard set forth in Rule 59(e) of the Federal Rules of Civil Procedure as its guide. *See id.* at 1024. In so doing, the district court rejected the Government's motion for reconsideration upon the ground that the Government failed to establish that "the evidence . . . was unavailable at the time of the hearing." *Id.* This interlocutory appeal followed.

III.

Before determining whether Congress possesses the authority to enact § 3501, we must first consider whether the district court erred in refusing to entertain the Govern-

ment's motion for reconsideration.[10] (Text continued on page 16) [Page 15] [Page 16]

---

[10] Dickerson contends that federal law does not grant the Government the right to appeal an order denying reconsideration of a suppression ruling. It is well established that the Government cannot appeal an adverse ruling in a criminal prosecution without statutory authority. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Sanges*, 144 U.S. 310, 312 (1892). Such authority, the Government maintains, is contained in 18 U.S.C.A. § 3731 (West Supp. 1998). *See United States v. Scott*, 437 U.S. 82, 84-85 (1978) (discussing the enactment of § 3731 to provide government appeals in criminal cases).

Section 3731 provides, in pertinent part, as follows:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence.
>
> . . . .
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C.A. § 3731. Although § 3731 authorizes the Government to appeal orders suppressing evidence, Dickerson contends that it does not expressly authorize the Government to appeal a decision denying reconsideration of a suppression ruling. The issue, not heretofore decided by this Court, is whether § 3731, which provides that it should be liberally construed to effectuate its purposes, can be so construed as to authorize this appeal. We conclude, for the reasons that follow, that it can.

In *United States v. Ibarra*, 502 U.S. 1 (1991) (per curiam), the defendant was indicted for possession of cocaine with intent to distribute. *See id.* at 2. The district court, however, ordered that certain evidence be suppressed. *See United States v. Ibarra*, 725 F. Supp. 1195, 1202 (D. Wyo. 1989). The Government filed a motion for reconsideration, which was denied. *See United States v. Ibarra*, 731 F. Supp. 1037, 1041 (D. Wyo. 1990). On appeal, the Tenth Circuit dismissed the Government's appeal as untimely. *See United States v. Ibarra*, 920 F.2d 702, 707 (10th Cir. 1990) (holding that appeal must be filed within thirty days of a district court's suppression ruling). On petition for certiorari, the Supreme Court held that the thirty-day period in which the Government was required to file its appeal under § 3731 began to run on the date that the district court denied the Government's motion for reconsideration, not on the date of the district court's original suppression order. *See Ibarra*, 502 U.S. at 6-7. In so holding, the Supreme Court necessarily concluded that § 3731 authorizes the Government to appeal a decision denying reconsideration of a suppression ruling.

Our conclusion that we have jurisdiction to hear this appeal is also buttressed by the knowledge that, in enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975); *see also Arizona v. Manypenny*, 451 U.S. 232, 247 & n.24, 249 (1981) (noting that Government appeals are permitted to the extent that they are not prohibited by the Constitution). Dickerson does not contend that the instant appeal is constitutionally prohibited. Thus, Dickerson's suggestion that we lack jurisdiction to hear this appeal is without merit. *Accord United States v. Hassan*, 83 F.3d 693, 697 (5th Cir. 1996) (holding that " 'an appeal from a denial of a motion to reconsider necessarily raises the underlying [suppression] judgment for review' " (quoting *United States v. Herrold*, 962 F.2d 1131, 1136 (3d Cir. 1992))); *United States v. Roberts*, 978 F.2d 17, 18 (1st Cir. 1992) (entertaining Government's appeal from the denial of a motion to reconsider a suppression ruling).

Although a case of first impression in this Court, our sister circuits review a district court's refusal to reopen a suppression hearing for abuse of discretion. *See, e.g., United States v. Hassan*, 83 F.3d 693, 696 (5th Cir. 1996); *United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992); *United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). We adopt that standard here.

Under an abuse of discretion standard, a reviewing court may not substitute its judgment for that of the district court. *See, e.g., United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995). Indeed, an appeals court may uphold the exercise of a district court's discretion even where it might have ruled differently on the matter in the first instance. Instead, our task is simply to determine whether the district court's exercise of discretion was

arbitrary or capricious in light of the governing law and the facts. *See, e.g., id.*

In its motion for reconsideration, the U.S. Attorney's Office asked the district court to reverse its suppression rulings on two grounds. First, the Government presented the district court with additional evidence that corroborated Special Agent Lawlor's testimony concerning when Dickerson was read his *Miranda* warnings. Second, the Government argued that even if Dickerson's confession was elicited in technical violation of *Miranda*, it was nevertheless admissible under 18 U.S.C.A. § 3501 (West 1985). We address each ground in turn.

A.

Relying upon Rule 59(e) of the Federal Rules of Civil Procedure, the district court rejected the Government's motion for reconsideration [Page 17] because the Government failed to establish that "the evidence . . . was unavailable at the time of the hearing." *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997). The Government actually conceded, as it does on appeal, that the evidence forming the basis for its motion was available at the time of the suppression hearing. The Government explains, however, that the evidence was not introduced because (1) it never believed that the district court would find Dickerson more believable than Special Agent Lawlor; and (2) it did not want to burden the district court with cumulative evidence.

As an initial matter, although Rule 59(e) of the Federal Rules of Civil Procedure requires a showing that the evidence supporting a motion for reconsideration was not available at the time of the initial hearing. *see Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993), the Federal Rules of Civil Procedure are not binding in criminal proceedings. As a result, that evidence was available to the movant prior to the suppression hearing does not, as a matter of law, defeat a motion for reconsideration in a

criminal case. *See, e.g., United States v. Regilio*, 669 F.2d 1169, 1177 (7th Cir. 1981) (recognizing that "society's interest in admitting all relevant evidence militates strongly in favor of permitting reconsideration").

We also recognize, however, that the district court has a strong interest in controlling its docket and avoiding piecemeal litigation. Thus, when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, as was the case here, the movant must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress before we will determine that a district court abused its discretion in refusing to reconsider its suppression ruling.[11] [Page 18]

Before considering the Government's reasons for failing to introduce the evidence in question, however, we note that it was given numerous opportunities to introduce the evidence prior to the district court's ruling on the suppression motion. Dickerson's motion to suppress was filed on May 19, 1997. On May 23, 1997, the Government filed a response to Dickerson's motion to suppress. Four days later, the Government supplemented its response. A hearing on the motion was held on May 30, 1997. Finally, at the district court's request, the Government was given yet another opportunity to file an additional supplemental memorandum in support of its position on June 3, 1997.

---

[11] We note that granting a new trial on the basis of evidence available at the time of the trial is strictly prohibited. *See, e.g., United States v. Bales*, 813 F.2d 1289, 1295 (4th Cir. 1987) (noting that under Fed. R. Crim. P. 33 "the evidence must be, in fact, newly discovered, *i.e.*, discovered since the trial"); *United States v. Singh*, 54 F.3d 1182, 1190 (4th Cir. 1995) (same). Of course, Rule 33 of the Federal Rules of Criminal Procedure, which governs new trial motions, does not apply to motions for reconsideration of evidentiary rulings prior to trial. As such, granting a motion for reconsideration on the basis of evidence available to the movant at the time of the suppression hearing is not strictly prohibited.

At none of these junctures did the Government introduce the two affidavits and the statement.

In light of the ample opportunities the Government had to introduce the evidence in question prior to the district court's ruling on the motion to suppress, its articulated reasons for failing to do so ring hollow. First, the Government contends that it never believed that the district court would find Dickerson more credible than Special Agent Lawlor. Even if this explanation was tenable prior to the suppression hearing, Special Agent Lawlor's testimony on the primary issue in dispute, *i.e.*, whether Dickerson was read his *Miranda* warnings prior to his confession, was completely undermined by the Government's own documentary evidence, which supported Dickerson's version of events. After the hearing, therefore, the Government should have been firmly disabused of any misconceptions concerning whom the district court would find more credible. Because the Government was given the opportunity to file a supplemental memorandum after the hearing, the Government's failure to introduce the affidavits to Detective Durkin and Agent Wenko and the statement written by Dickerson cannot be explained by its first justification.

Next, the Government contends that it did not want to burden the district court with cumulative evidence. What the Government means by cumulative evidence is not entirely clear. Because every additional piece of evidence offered is, by definition, cumulative, cumulative evidence is not bad *per se*. Indeed, under the Federal Rules of Evidence it is the "needless presentation of cumulative evidence" that is to be avoided.[12] Fed. R. Evid. 403. With

[12] We do not mean to imply that the Federal Rules of Evidence are binding at a suppression hearing; they are not. *See* Fed. R. Evid. 104(a) (providing that the rules of evidence are not binding at a preliminary proceeding). We refer to Rule 403 only because it casts some light on the phrase "cumulative evidence."

that understanding, the Government's [Page 19] argument necessarily assumes that Special Agent Lawlor's testimony should have been sufficient and that any additional evidence would, in fact, be needlessly cumulative. For the reasons stated above, however, the Government should have known after the hearing that additional evidence was not needlessly cumulative, but absolutely necessary.[13]

In any event, why the Government would consider the statement written by Dickerson—in which he admits that he was read his *Miranda* warnings prior to implicating himself in a series of bank robberies—to be needlessly cumulative on the pivotal question of whether he was read his *Miranda* warnings prior to implicating himself in a series of bank robberies is difficult to understand. Evidence that is so probative that it would likely change the mind of the factfinder is not needlessly cumulative. *Cf.* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5220, at 306 (1978) (noting similar principle under Rule 403). [Page 20]

[13] In its motion for reconsideration, the Government confessed that "this [was] one of those deals where they [threw] the case at [the Assistant United States Attorney] at 4:00 on the day before [the hearing]." *United States v. Dickerson*, 971 F. Supp. 1023, 1025 n.2 (E.D. Va. 1997) (final alteration in original). Similarly, during the hearing on the motion to reconsider the Government acknowledged "that the Assistant United States Attorney had very little time to prepare [Special] Agent Lawlor." *Id.* at 1024. Had the Government simply compared Special Agent Lawlor's recollection of events against its documentary evidence prior to the suppression hearing, it would have discovered the need to introduce additional evidence.

While we respect the Government's candidness on this point, it raises further questions relating to the proffered reasons for failing to present the additional affidavits and statement earlier. For example, if the Government failed to prepare and present its case properly, we wonder how it could have known that additional evidence would be needlessly cumulative.

In sum, because the district court gave the Government the opportunity to introduce the affidavits of Detective Durkin and Agent Wenko and Dickerson's handwritten statement after the suppression hearing, we conclude that the Government's failure to do so cannot adequately be explained by its proffered reasons. Accordingly, we cannot say that the district court abused its discretion in denying the Government's motion for reconsideration based upon its refusal to consider evidence that was in the Government's possession at the time of the initial hearing.

B.

Because "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 116 S. Ct. 2035, 2047 (1996), we must address the Government's second proffered ground for reconsideration of the suppression ruling, namely whether § 3501, rather than *Miranda*, governs the admissibility of Dickerson's confession.

1.

Whether § 3501 or *Miranda* governs the admissibility of Dickerson's confession ultimately turns on the answers to two questions. Does § 3501 purport to supersede the rule set forth by the Supreme Court in *Miranda*? If it does, does Congress possess the authority legislatively to overrule *Miranda*? Prior to addressing these questions, however, we feel compelled to respond to the dissent's assertion that the question of § 3501's applicability is not properly before us.

Although raised by the Government in its motion for reconsideration, the applicability of § 3501 was not briefed by the Government on appeal.[14] We note, however, that this was no simple oversight. The [Page 21] United States Department of Justice took the unusual step of actually prohibiting the U.S. Attorney's Office from

[14] Pursuant to Local Rule 27(c), the clerk's office granted the unopposed motion of the Washington Legal Foundation and the Safe Streets Coalition (amici) to file a brief in this case. In light of the Government's unwillingness to defend the constitutionality of § 3501, amici also sought leave to share five minutes of the Government's allotted oral argument time. Under the Federal Rules of Appellate Procedure, "[a] motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons." Fed. R. App. P. 29. Because the Department of Justice's refusal to defend the constitutionality of an Act of Congress is an extraordinary event, we granted amici's motion to share oral argument time with the Government. Indeed, federal courts have frequently appointed amici to participate in oral argument where neither side will defend an important position. *See, e.g., Bousley v. United States*, 118 S. Ct. 1604, 1609 (1998) (inviting private party to file an amicus brief and to participate in oral argument when Government declined to defend ruling in its favor); *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 n.9, 599 n.24 (1983) (same); *McKinney v. Indiana Michigan Power Co.*, 113 F.3d 770, 772 n.2 (7th Cir. 1996) (appointing amicus "so that [the court] might have the benefit of an adversary presentation of the issues raised by the appeal"); *United States v. Chagra*, 701 F.2d 354, 366 (5th Cir. 1983) (appointing amicus "to ensure that this appeal continues to be presented in an adversary context").

Amici urged this Court, both in its brief and during oral argument, to consider the admissibility of Dickerson's confession under the mandate of § 3501. Although we had the benefit of amici's briefing, the dissent criticizes our application of § 3501 "without the benefit of any briefing in opposition." *Post* at 47. Although we would have preferred to have had such briefing, the Department of Justice, as we note in greater detail above, actually prohibited the U.S. Attorney's Office from briefing § 3501 in this case. *Cf.* Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division § Chiefs (Nov. 6, 1997) (forbidding "federal prosecutors [from] rely[ing] on the voluntariness provision of § 3501"). Moreover, when pressed at oral argument, counsel for the United States informed the Court that he had been prohibited by his superiors at the Department of Justice from discussing § 3501. Because it is our duty to apply the governing law to every case or controversy before us, it was unfortunately necessary to proceed without any briefing from the Department of Justice.

briefing the issue. To be sure, this was not an isolated incident. Over the last several years, the Department of Justice has not only failed to invoke § 3501, it has affirmatively impeded its enforcement.

For example, in *Davis v. United States*, 512 U.S. 452 (1994), which involved the defendant's attempt to suppress an incriminating statement [Page 22] made after an ambiguous request for counsel, the Department of Justice expressly declined to take a position on the applicability of § 3501. *See id.* at 457 n.*. As a result, the majority opinion declined to consider the issue. *See id.* (declining to reach issue because "we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position"). Justice Scalia, in a concurring opinion, chided the Department of Justice for its failure to invoke § 3501:

> The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of "*Miranda*" issues that might be entirely irrelevant under federal law. Worse still, it may have produced—during an era of intense national concern about the problem of run-away crime—the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this.

Id at 465 (citations omitted). Justice Scalia further questioned whether the Department of Justice's failure to invoke § 3501 was "consistent with the Executive's obligation to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. Const. Art. II, § 3).

Over the past few years, career federal prosecutors have tried to invoke § 3501 in this Court only to be overruled by the Department of Justice.[15] In March of 1997, for example, the U.S. Attorney's [Page 23] Office in Alexandria, Virginia, appealed the suppression of a statement that the district court found was obtained in technical violation of *Miranda*. *See United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998). In its brief, the U.S. Attorney's Office urged this Court to reverse the district court on the basis of § 3501. The Department of Justice, however, ordered the U.S. Attorney's Office to withdraw its brief. In its place, a brief without any reference to § 3501 was filed. As a result, the Washington Legal Foundation and United States Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond filed an amicus brief urging this Court to consider the admissibility of

---

15 Justice's refusal to invoke § 3501 has not been limited to this Circuit. In *Cheely v. United States*, 21 F.3d 914 (9th Cir. 1994), the Ninth Circuit suppressed an incriminating statement that was obtained in technical violation of *Edwards*. *Id.* at 923. Although the Government did not petition for rehearing, the Ninth Circuit *sua sponte* asked the parties whether the case merited rehearing en banc. *See Cheely v. United States*, 92-30257 (9th Cir. May 25, 1994) (unpublished order). Curiously, Justice filed a memorandum opposing further review. One week later, the Supreme Court in *Davis v. United States*, 512 U.S. 452 (1994), would bring § 3501 to the attention of the legal community. In response, a career federal prosecutor sent a letter to the Ninth Circuit apprising them of the Court's decision in *Davis*. Later that same day, Solicitor General Drew Days withdrew the earlier letter and replaced it with a letter that downplayed the relevance of *Davis* to the issues at hand. Notwithstanding the letter from the Solicitor General, the Ninth Circuit "called for supplemental briefing from the parties as to the effect *Davis* might have on our conclusion" to suppress the statements in question. *Cheely v. United States*, 86 F.3d 1439, 1448 (9th Cir. 1994). Although Justice filed a supplemental brief, it nevertheless failed to even argue the applicability of § 3501. Upon reconsideration, the Ninth Circuit still suppressed the statement. *See id.*

Sullivan's confession under § 3501. Because we ultimately concluded that Sullivan was not in custody for *Miranda* purposes when the incriminating statements were made, we had no occasion to address the applicability of § 3501. *See id.* at 134 n.*.

In June of 1997, this Court issued an opinion upholding the suppression of a confession obtained in technical violation of *Miranda*. *See United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997) (unpublished). Although the United States did not seek rehearing, the Washington Legal Foundation and the Safe Streets Coalition moved this Court for leave to proceed as amici curiae. In their motion, the putative amici took the Government to task for failing to assert the applicability of § 3501. As a result, we ordered the Department of Justice to address the effect of § 3501 on the admissibility of Leong's confession. In response, Attorney General Janet Reno, although purporting to follow the advice of her career prosecutors in other matters, notified Congress that the Department of Justice would not defend the [Page 24] constitutionality of § 3501, *see* 2 U.S.C.A. § 288k(b) (West 1997) (requiring the Department of Justice to notify the United States Congress whenever it will not defend the constitutionality of a federal statute), and filed with this Court a brief to the same effect.[16]

Against this background, the Government's failure to raise the applicability of § 3501 on appeal in this case

[16] The Department of Justice has taken the position that unless the Supreme Court overrules *Miranda*, "the United States is not free to urge the lower courts" to "rely on § 3501." *See* Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division § Chiefs (Nov. 6, 1997) (noting that "[t]he Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda*").

does not come as a surprise. Of even greater importance, neither does it prevent us from considering the applicability of § 3501 on appeal. Even where the parties abdicate their responsibility to call relevant authority to this Court's attention, *cf.* Va. Code Prof. Resp. 7-20, they cannot prevent us from deciding the case under the governing law simply by refusing to argue it, *see United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993).[17] Indeed, it is now well established that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young v. United States*, 315 U.S. 257, 259 (1942). [Page 25]

The dissent contends that "we are faced with essentially the same situation that the Supreme Court confronted in *Davis* when it refused to take up § 3501." *Post* at 49. We disagree. Although the Supreme Court declined *sua sponte* to consider the applicability of § 3501 in *Davis*, 512 U.S. at 457 n.*, that decision was influenced by prudential concerns not present here, *id.* at 465 (Scalia, J., concurring) (noting that the Court's decision not to con-

[17] The dissent argues, and we do not dispute, that "the only issues not raised by the parties that we are *required* to consider are those of subject matter jurisdiction and justiciability." *Post* at 48 (emphasis added). That observation, however, is of no real import. First, as we note above, this Court may, in its discretion, consider issues not raised below. *See post* at 25-26. Second, and more importantly, we are not considering an issue that was not raised by the parties. The issue on appeal is the district court's suppression ruling. Without question, we are free to address ourselves to any legal theory that would bear on the issue under appeal. *See Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274, 275 n.1 (4th Cir. 1997) ("We have consistently recognized that we may [decide a case] on different grounds than those employed by the district court."); *Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993) (same). Thus, because the Government has appealed the district court's suppression ruling, we are free to consider the applicability of § 3501.

sider the applicability of § 3501 was influenced by prudential concerns, rather than by statutory constraints on the Supreme Court's jurisdiction). As a general matter, "a court should avoid deciding a constitutional question when it can dispose of a case on another basis." *Jimenez v. BP Oil, Inc.*, 853 F.2d 268, 270 (4th Cir. 1988) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Having determined that the defendant's ambiguous reference to an attorney during a custodial interrogation was not a request for counsel for purposes of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), *see Davis*, 512 U.S. at 459, the Court had no reason to consider whether the defendant's confession was also admissible under the mandate of § 3501, especially because the Department of Justice had expressly declined to take a position on the provision's constitutionality, *see id.* at 457 n.*. Dickerson's confession, in contrast, was obtained in violation of *Miranda*. Thus, unlike the situation in *Davis*, we cannot avoid deciding the constitutional question associated with § 3501. Moreover, and again unlike the situation in *Davis*, the Department of Justice has now taken the position that § 3501 is unconstitutional. *See* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997) (notifying Congress that the Department of Justice will not defend the constitutionality of the statute). As a result, the specific prudential concerns that animated the Supreme Court's decision not to consider the applicability of § 3501 in *Davis* are simply not present here.

Furthermore, the primary reason for the Supreme Court's general reluctance to consider arguments not raised is not applicable to inferior federal courts such as this one. The Supreme Court "sits as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927). Thus, it generally will not consider issues "not pressed or passed upon below." *Id.; see also Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (declining to address issue that was not presented to either the District Court or the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where [Page 26] issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). In contrast, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also United States Nat'l Bank of Or.*, 508 U.S. at 445-48 (stating that it was proper for the Court of Appeals to consider whether the controlling statute had been repealed despite the parties' failure to raise the issue).

Because the Department of Justice will not defend the constitutionality of § 3501—and no criminal defendant will press the issue—the question of whether that statute, rather than *Miranda*, governs the admission of confessions in federal court will most likely not be answered until a Court of Appeals exercises its discretion to consider the issue. Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. As a result, we are required to consider the issue now. *Cf. Davis*, 512 U.S. at 464 (Scalia, J., concurring) (noting that the "time will have arrived" to consider the applicability of § 3501 the next time "a case that comes within the terms of th[e] statute is . . . presented to us"); *see also* Eric D. Miller, comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029 (1998) (answering question in the affirmative).

a.

Having determined that the issue is properly before the panel, we must first determine whether § 3501 purports to supersede the rule set forth by the Supreme Court in *Miranda*. To do so, a brief history of the rules governing the admissibility of confessions before and after *Miranda* is in order. *See generally Development in the Law Confessions*, 79 Harv. L. Rev. 935 (1966) [hereinafter *Developments*].

"At early common law, confessions were admissible at trial without restrictions." *Id.* at 954; *see also McCormick's Handbook on the Law of Evidence* § 147, at 313 (1972) (Edward W. Cleary, ed., West 2d ed. 1972) (citing 3 Wigmore, Evidence § 818 (3d ed. 1940)). In the latter part of the eighteenth century, however, courts began to recognize [Page 27] that certain confessions were not trustworthy. *See, e.g., The King v. Rudd*, 168 Eng. Rep. 160 (K.B. 1783) (holding that "no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear"). Although several tests were developed to determine whether a confession was trustworthy, a confession was generally thought to be reliable only if made voluntarily. *See, e.g., Regina v. Garner*, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852).

In *Hopt v. Utah*, 110 U.S. 574 (1884), the Supreme Court specifically adopted the common law rule that a confession was reliable, and therefore admissible, if it was made voluntarily. *Id.* at 584-85 (holding that a confession was voluntary if not induced by threat or promise) (citing *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852)); *see also Pierce v. United States*, 160 U.S. 355, 357 (1896) (same). In subsequent cases, the Supreme Court applied the common law test of voluntariness to confessions. *See* Developments, *supra*, at 959. In so doing, the Court rejected the argument that a confession was involuntary simply because the suspect was in custody. *See Sparf v. United States*, 156 U.S. 51, 55 (1895). Similarly, in *Wilson v. United States*, 162 U.S. 613 (1896), the Supreme Court specifically held that the failure to warn a suspect of his right to remain silent and of his right to counsel did not render a confession involuntary. *Id.* at 624.

In *Bram v. United States*, 168 U.S. 532 (1897), the Supreme Court asserted, for the first time, a constitutional basis for its requirement that a confession be made voluntarily. *Id.* at 542 (stating that whether a confession is voluntary "is controlled by that portion of the fifth amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself' " (quoting U.S. Const. amend. V.)). According to the Court, the Fifth Amendment privilege against self-incrimination "was but a crystallization" of the common law rule that only voluntary confessions are admissible as evidence. *Id.* Although the Supreme Court—prior to *Miranda*—would eventually place less reliance upon the approach taken in *Bram*, *see, e.g., United States v. Carignan*, 342 U.S. 36, 41 (1951) (expressing doubt about "[w]hether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from [Page 28] a rule that forced confessions are untrustworthy" (footnote omitted)), the Supreme Court in *Brown v. Mississippi*, 297 U.S. 278 (1936), invoked another constitutional basis for its requirement that a confession be made voluntarily: the Due Process Clause. *Id.* at 285-86. Thereafter, a confession was admissible only if vountary within the meaning of the Due Process Clause.

See, e.g., Haynes v. Washington, 373 U.S. 503 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944); *Chambers v. Florida*, 309 U.S. 227 (1940).

Thus, prior to *Miranda*, the rule governing the admissibility of confessions in federal court—if not the rule's justification—remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily. *See, e.g., Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (noting that prior to *Miranda*, "voluntariness *vel non* was the touchstone of admissibility of confessions"); *Miranda v. Arizona*, 384 U.S. 436, 506-07 (1966) (Harlan, J., dissenting) (noting that voluntariness has been the test for admitting confessions since the earliest days of the Republic). Indeed, in *Lisenba v. California*, 314 U.S. 219 (1941), the Supuere Court specifically referred to "voluntariness" as the federal test for determining the admissibility of confessions. *Id.* at 236.

Such was the stage in 1966 when the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court announced a new analytical approach to the admissibility of confessions. Specifically, the Court rejected a case-by-case determination of whether a confession was voluntary. Instead, the Court held that any statement stemming from the custodial interrogation of a suspect would be presumed involuntary, and therefore inadmissible, unless the police first provided the suspect with four warnings.[18] Although the Court relied upon its prior decision in *Bram v. United States*,

[18] The four warnings are: (1) that the suspect has the right to remain silent; (2) that any statements he makes can be used against him; (3) that he has the right to the presence of an attorney during questioning; and (4) that an attorney will be appointed for him if he cannot afford one. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

168 U.S. 532 (1897) (holding that voluntariness is required by the Fifth Amendment), for support, *Miranda*, 384 U.S. at 461-62, the Court acknowledged that the Constitution requires no "particular [Page 29] solution for the inherent compulsions of the interrogation process," *id.* at 467, and left open the opportunity for the States and Congress to "develop their own safeguards for the privilege, so long as they are fully as effective as [the four warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it," *id.* at 490. The Court held that until that time, the warning "safeguards must be observed." *Id.* at 467.

Congress enacted § 3501 just two years after the Supreme Court decided *Miranda*. When interpreting an act of Congress, "our inquiry begins with an examination of the language used in the statute." *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996) (citing *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir.), *cert. denied*, 117 S. Ct. 54 (1996)), *cert. denied*, 117 S. Ct. 738 (1997). Section 3051 provides as follows:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant [Page 30] had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the

confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confression made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any selfincriminating statement made or given orally or in writing. [Page 31]

18 U.S.C.A. § 3501. The above-quoted statutory language is plain. Congress has provided that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court. *See, e.g.*, Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 545 (5th ed. 1996) (noting that "the intent of Congress was to 'overrule' *Miranda* in favor of a return to the 'voluntariness' standard").

That Congress wished to return to a case-by-case determination of whether a confession was voluntarily given is undeniable. *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. Although certainly not dispositive, it is worth noting that the Senate Report accompanying § 3501 specifically stated that "[t]he intent of the bill is to reverse the holding of *Miranda v. Arizona*, 384 U.S. 436 (1966)." *Id.* at 2141. Indeed, although acknowledging that "[t]he bill would also set aside the holdings of such cases as *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957)," *id.*, the Report stated that *Miranda* "is the case to which the bill is directly addressed," *id.* Senate opponents likewise recognized that § 3501, by making voluntariness the sole criterion for the admissibility of confessions, was meant to repeal the irrebuttable presumption created by *Miranda*. *See id.* at 2210-11 (noting that § 3501 was "squarely in conflict with the Supreme Court's decision in *Miranda v. Arizona*").

Similarly, both proponents and opponents of § 3501 in the House of Representatives noted that the statute was meant to overrule the irrebuttable presumption created by *Miranda*. *See, e.g.*, 114 Cong. Rec. 16,066 (1968) (statement of Rep. Celler); *id.* at 16,074 (statement of Rep. Corman); *id.* at 16,278 (statement of Rep. Poff); *id.* at 16,279 (statement of Rep. Taylor); *id.* at 16,296 (statement of Rep. Randall); *id.* at 16,297-98 (statement of Rep. Pollock).

Although Congress enacted § 3501 with the express purpose of restoring voluntariness as the test for admitting confessions in federal court, it is important to note that Congress did not completely abandon the central holding of *Miranda*, *i.e.*, the four warnings are important [Page 32] safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C.A. § 3501(b). Congress simply provided that the failure to administer the warnings to a suspect would no longer create an irrebuttable presumption that a subsequent confession was involuntarily given. *See id.* (providing that the *Miranda* warnings are not dispositive on the issue of voluntariness).

b.

Based on the statutory language alone, it is clear that Congress enacted § 3501 with the express purpose of returning to the pre-*Miranda* case-by-case determination of whether a confession was voluntary. We now turn to our next inquiry: Does Congress possess the authority to supersede the irrebuttable presumption created in *Miranda* that any unwarned statement to the police is involuntary, and therefore inadmissible?

Interestingly, much of the scholarly literature on *Miranda* deals not with whether Congress has the legislative authority to overrule the presumption created in *Miranda*, but whether it should. *Miranda*'s opponents, like Professor Paul Cassell, contend that thousands of violent criminals escape justice each year as a direct result of *Miranda*. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U. L. Rev. 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996). In contrast, its proponents, like Professor Stephen Schulhofer, argue that *Miranda* has

had little impact on law enforcement's ability to obtain confessions. *See, e.g.*, Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987). This debate, however, is one we need not enter. Whether Congress should overrule *Miranda* tells us nothing about whether it could. More importantly, it is not our role to answer that question. It is the province of the judiciary to determine what the [Page 33] law is, not what it should be. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Court recently held that Congress does not possess the legislative authority to supersede a Supreme Court decision construing the Constitution. *See id.* at 2172 (refusing to enforce federal statute establishing more narrow test for violation of the Free Exercise Clause than prior test established by Supreme Court). On the other hand, Congress possesses the legislative authority to overrule judicially created rules of evidence and procedure that are not required by the Constitution. *See Palermo v. United States*, 360 U.S. 343, 345-48 (1959) (upholding federal statute establishing more narrow disclosure of *Jenks* material than prior rule established by Supreme Court); *see also Carlisle v. United States*, 517 U.S. 416, 426 (1996) (noting that the federal courts may formulate rules of evidence and procedure so long as they do not conflict with an Act of Congress); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (upholding statute altering the evidentiary standard for expatriation proceedings established by the Supreme Court because prior standard created by the Court was not required by "the Constitution"). In fact, the power of the Supreme Court to prescribe nonconstitutional "rules of procedure and evidence for the

federal courts exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11 (citing *Funk v. United States*, 290 U.S. 371, 382 (1933), and *Gordon v. United States*, 344 U.S. 414, 418 (1953)).

Whether Congress has the authority to enact § 3501, therefore, turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. If it is, Congress lacked the authority to enact § 3501, and *Miranda* continues to control the admissibility of confessions in federal court. *See City of Boerne*, 117 S. Ct. at 2172. If it is not required by the Constitution, then Congress possesses the authority to supersede *Miranda* legislatively, and § 3501 controls the admissibility of confession in federal court. *See Palermo*, 360 U.S. at 353 n.11.

Using the same analysis, several federal courts found that § 3501 superseded the rule set forth in *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957). *See United States v. Pugh*, 25 F.3d 669, 675 (8th Cir. 1994) (holding [Page 34] that § 3501 superseded the *McNabb/Mallory* rule); *United States v. Christopher*, 956 F.2d 538-39 (6th Cir. 1991) (noting that § 3501, rather than *McNabb/Mallory*, governs the admissibility of confessions in federal court). In particular, the Eighth and Sixth Circuits first ascertained whether the rule set forth by the Supreme Court in *McNabb* and *Mallory* was required by the Constitution. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39. In *McNabb*, the Supreme Court exercised its supervisory power over the federal courts to exclude all incriminating statements, including voluntary confessions, obtained during an unreasonable delay between a defendant's arrest and initial appearance. *See* 318 U.S. at 343-44. In *Mallory* the Supreme Court affirmed the holding of *McNabb* under Rule 5(a) of the Federal Rules of Criminal Procedure. *See* 354 U.S. at 455-56. Finding that the

rule set forth in *McNabb* and *Mallory* was not required by the Constitution, the Eighth and Sixth Circuits had little difficulty concluding that Congress possessed the legislative authority to overrule both cases. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39.[19]

We begin our analysis then, with the Supreme Court's decision in *Miranda*. Several passages in Chief Justice Warren's opinion for the Court suggest that the warnings safeguard rights guaranteed by the [Page 35] Constitution. *See, e.g., Miranda*, 384 U.S. at 490 (noting that the privilege against self-incrimination is guaranteed by the Constitution). Surprisingly, the sixty-page opinion does not specifically state the basis for its holding that a statement obtained from a suspect without the warnings would be presumed involuntary. The Court strongly suggested, however, that the basis for the rule was identical to that set forth in *McNabb* and *Mallory*. *See id.* at 463. In particular, just as the "supervisory" rule set forth in *McNabb* and *Mallory* permitted the Court to avoid the constitutional issues associated with federal interrogations, *see id.*, the rule set forth in *Miranda* would allow the Court to avoid the constitutional issues associated with state interrogations, *see id.*

---

19 Interesting, although this Court has not addressed the effect of § 3501 on either *Miranda* or *McNabb/Mallory*, we have repeatedly cited the provision when making voluntariness determinations without ever suggesting that any part of the section is unconstitutional. *See, e.g., United States v. Braxton*, 112 F.3d 777, 784 & n.* (4th Cir.) (en banc), *cert. denied*, 118 S. Ct. 192 (1997); *United States v. Wilson*, 895 F.2d 168, 172-73 (4th Cir. 1990); *United States v. Pelton*, 835 F.2d 1067, 1074 (4th Cir. 1987); *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984); *United States v. Gonzales*, 736 F.2d 981, 983 (4th Cir. 1984); *United States v. Dodier*, 630 F.2d 232, 236 (4th Cir. 1980); *United States v. Sauls*, 520 F.2d 568, 569 (4th Cir. 1975); *United States v. Johnson*, 495 F.2d 378, 382 (4th Cir. 1974). Indeed, in *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998), we recently held that a fifty-five hour delay between the defendant's arrest and arraignment did not render the defendant's confession inadmissible, without citing either *McNabb* or *Mallory*, because under the mandate of § 3501 such delay "is only one factor to be considered when determining the admissibility of a confession." *Id.* at 348-49.

Although the Court failed to specifically state the basis for its holding in *Miranda*, it did specifically state what the basis was not. At no point does the Court refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, *id.* at 467, disclaimed any intent to create a "constitutional straightjacket," *id.*, repeatedly referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490.

Since deciding *Miranda*, the Supreme Court consistently (and repeatedly) has referred to the warnings as "prophylactic," *New York v. Quarles*, 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *see also Davis v. United States*, 512 U.S. 452, 457-58 (1994) (referring to *Miranda* warnings as "a series of recommended procedural safeguards" (internal quotation marks omitted)); *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993) (acknowledging that "*Miranda*'s safeguards are not constitutional in character"); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (noting that the *Miranda* warnings are not required by the Constitution); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (noting that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (noting that the *Miranda* exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation"); *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring) (noting that the [Page 36] Court

in *Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution").

One of the first opinions construing *Miranda* was *Harris v. New York*, 401 U.S. 222 (1971). In *Harris*, the defendant, charged with selling heroin, made several statements to the police prior to receiving his *Miranda* warnings. *See id.* at 223-24. At trial, the defendant took the stand in his own defense. *See id.* at 223. During cross-examination, he was asked whether he had previously made any statements to the police that contradicted his direct testimony. *See id.* Although not admissible as substantive evidence, the Court held, per Chief Justice Burger, that the statements in question could be admitted for purposes of impeaching his credibility because, although obtained in technical violation of *Miranda*, the statements were made voluntarily. *See id.* at 224-25; *cf. Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (holding that involuntary statements, as opposed to statements made in technical violation of *Miranda*, could not even be admitted for impeachment purposes).

In *Tucker*, the Supreme Court was asked to apply the "tainted fruits" doctrine from *Wong Sun v. United States*, 371 U.S. 471 (1963), to the testimony of a witness whose identity was discovered as the result of a statement obtained from the defendant in violation of *Miranda*. *See* 417 U.S. at 436-37. In declining to extend the "tainted fruits" doctrine to the facts in *Tucker*, the Court noted that the unwarned questioning did not abridge the defendant's Fifth Amendment privilege, "but departed only from the prophylactic standards later laid down by this court in *Miranda* to safeguard that privilege." 417 U.S. at 445-46. Because the defendant's constitutional rights were not infringed, the Court in *Tucker* determined that the "fruit

of the poisonous tree" doctrine did not apply. *Id.* at 445-46 & n.19.

In *Quarles*, the Supreme Court was asked by the State of New York to recognize an emergency exception to *Miranda*. *See* 467 U.S. at 649. In that case, a young woman told two police officers that she had just been raped, that her assailant had just entered a nearby store, and that he was carrying a gun. After entering the store the officers quickly spotted the defendant. After a short chase, the defendant was caught and searched. Because he was wearing an empty shoulder holster, the arresting officer asked him, prior to reading him his *Miranda* [Page 37] warnings, where the gun was located. *See id.* at 651-52. The defendant nodded in the direction of some empty cartons and stated, "the gun is over there." *Id.* at 652. Although obtained in technical violation of *Miranda*, the Government sought to introduce the defendant's statement in its case-in-chief. In recognizing an emergency exception to *Miranda*, the Supreme Court relied exclusively upon the fact that a violation of *Miranda* was not necessarily a violation of the Constitution. *See id.* at 654 (stating that "[t]he prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Consitution'" (quoting *Tucker*, 417 U.S. at 444)); *see also* Saltzburg & Capra, *supra*, at 555-56 ("[i]f the *Miranda* safeguards were constitutionally required, then presumably any confession obtained in violation of them would have to be excluded—even if the officer was faced with a situation where giving the safeguards may have posed a threat to public safety.").

When presented with another opportunity to extend the *Wong Sun* "tainted fruits" doctrine, the Supreme Court in *Oregon v. Elstad*, 470 U.S. 298 (1985), once again declined the invitation to do so. In *Elstad*, two officers went to the defendant's home with a warrant for his arrest. *See id.* at 300. After executing the warrant, the offi-

cers questioned the defendant about his role in the burglary of a neighbor's house. *See id.* at 301. As a result of the interrogation, the defendant confessed to the burglary. *See id.* The defendant was then escorted to the police station where the officers advised him for the first time of his *Miranda* rights. After waiving his rights, the defendant once again confessed to the burglary. *See id.* Later, the defendant sought to suppress his second confession as the "fruit of the poisonous tree," arguing that it was obtained only as the result of his first confession that was made in violation of *Miranda*. *See id.* at 302. The *Elstad* majority, however, held that the "tainted fruits" doctrine did not apply to the second confession for the same reasons the doctrine did not apply in *Tucker*. *See id.* at 308. Specifically, the Court held that "[s]ince there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a *constitutional* violation must be suppressed." *Id.* (emphasis added).

Of particular importance here, the Court in *Elstad* made the following observation about *Miranda:* [Page 38]

> The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

> But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.

Id. at 306-07 (internal footnotes and citations omitted).

In light of the foregoing cases, it is certainly "well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation." *United States v. Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997) (citing Supreme Court cases); *see also Correll v. Thompson*, 63 F.3d 1279, 1290 (4th Cir. 1995) (holding that "a technical violation of *Miranda* [is not necessarily] a Fifth Amendment violation"). As a consequence, the irrebuttable presumption created by the Court in *Miranda*—that a confession obtained without the warnings is presumed involuntary—is *a fortiori* not required by the Constitution.[20] [Page 39]

Accordingly, Congress necessarily possesses the legislative authority to supersede the conclusive presumption created by *Miranda* pursuant to its authority to prescribe

---

[20] Conclusive presumptions are "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). As the Supreme Court has explained in another context: "*Per se* rules . . . require the Court to make broad generalizations. . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). It is apparent, therefore, that conclusive presumptions, like the one contained in *Miranda*, are dictated by convenience, not the Constitution.

the rules of procedure and evidence in the federal courts. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959); *cf.* Alfredo Garcia, *Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?*, 10 St. Thomas L. Rev. 461, 461-65, 479 (1998) (concluding that § 3501 "overruled *Miranda*" but arguing that *Miranda* was already dead).[21]

It is worth recalling that Congress not only acted in response to the Court's invitation, *see Miranda*, 384 U.S. at 490 (inviting Congress and the States "to develop their own safeguards for [protecting] the privilege"), but that the Court in *Miranda* had acted in the absence of a relevant Act of Congress. It is well established that the Court's power to prescribe nonconstitutional "rules of procedure and evidence [Page 40] for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11. Thus, just as the Court was free to create an irrebuttable presumption that state-

---

21 The dissent does not dispute that the applicability of § 3501 turns on whether *Miranda* is a constitutional rule. Even more telling, after considering the merits, the dissent is unable to conclude that *Miranda*'s conclusive presumption is, in fact, required by the Constitution. In the end, the dissent poses only the following rhetorical question: "If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts." *Post* at 50. As noted above, the Supreme Court has stated in unmistakable terms that the rule set forth in *Miranda* is not required by the Constitution. *See ante* at 35-38. In fact, in one of the Supreme Court's most recent applications of *Miranda* to a state court prosecution the Supreme Court specifically stated that "*Miranda*'s safeguards are not constitutional in character." *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993). Thus, although the dissent raises an interesting academic question, the answer to why the Supreme Court applies *Miranda* in prosecutions arising in state courts has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution.

ments obtained without certain procedural safeguards are involuntary, Congress was free to overrule that judicially created rule.

To be sure, the *Miranda* warnings were meant to safeguard the Fifth Amendment privilege against self-incrimination. Indeed, under § 3501 any statement obtained in violation of the privilege must be suppressed. Thus, we cannot say that Congress's decision to eliminate the irrebuttable presumption created by *Miranda* lessens the protections afforded by the privilege. Indeed, the Court has recognized that *Miranda*'s irrebuttable presumption goes beyond what is required to protect the privilege. As a result, even "patently *voluntary* statements . . . must be excluded." *Elstad*, 470 U.S. at 307. In enacting § 3501, Congress simply recognized the need to offset the harmful effects created by *Miranda*'s irrebuttable presumption.[22]

---

22 In addition to recognizing the harmful effects created by *Miranda*'s irrebuttable presumption, Congress concluded that the Court's justification for the conclusive presumption—that custodial interrogations were inherently coercive and intimidating—was simply incorrect as an empirical matter. *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. During the subcommittee hearings, Senator Arlen Specter, then the district attorney of the City of Philadelphia, pointed out

> that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for their opinion in *Miranda* is not a correct portrayal of what actually goes on in police stations across the country. While there are isolated cases of police using coercive tactics, this is the exception rather than the rule.

Id. at 2134. Similarly, the final committee report concluded that the basis for the conclusive presumption in *Miranda* was faulty. *Id.* at 2142 (noting that the "data supporting the [Court's] conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed"); *id.* at 2134 (noting that "while . . . coercive practices might have been approved 30 years ago, they have no place

Cf. Sandstrom v. [Page 41] *Montana*, 442 U.S. 510, 523 (1979) (recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases). No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities.

Finally, lest there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings. As noted above, those warnings are

---

in modern police techniques"); *id.* (finding that "the Court overreacted to defense claims that police brutality is widespread").

In sum, Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive. As Senator Sam Ervin noted at the time § 3501 was enacted:

> A decision of the Supreme Court, if it is based on a factual assumption which is incorrect, may be subject to Congress' power to legislate. The Supreme Court has no right to make . . . determinations based on unsound factual assumptions. I don't believe the great majority of law enforcement officers in the United States are such disreputable people that they have to have the criminals protected against them.

Hearings on the Supreme Court Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 25 (1968). Senator Ervin's observation concerning Congress's authority to overrule Supreme Court decisions, whether or not correct as a general matter, is certainly correct when applied to judicially created presumptions. *See ante* note 20. It is well established that a conclusive presumption "should not be applied . . . in situations where the generalization is incorrect as an empirical matter." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). In fact, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* According to congressional findings, the basis for *Miranda*'s conclusive presumption is incorrect as an empirical matter, and the presumption does not reach the correct result, *i.e.*, suppressing only coerced confessions, most of the time that it is applied. As a result, Congress, pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts, was justified in abandoning the conclusive presumption when it enacted § 3501.

among the factors a district court should consider when determining whether a confession was vountarily given. *See* 18 U.S.C.A. § 3501(b). Indeed, federal courts rarely find confessions obtained in technical compliance with *Miranda* to be involuntary under the Fifth Amendment. *Cf. Elie*, 111 F.3d at 1143 (noting "that very few incriminating statements, custodial or otherwise, are held to be involuntary" (internal quotation marks omitted)). Thus, providing [Page 42] the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness.

In the end, and after an exhaustive review of the relevant authority, we are convinced that § 3501—enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts—is constitutional. We are reassured in our conclusion by the fact that our dissenting colleague, after examining all of the relevant authority at his disposal, has been unable to conclude differently. At best, the dissent can but pose a rhetorical question concerning the constitutionality of § 3501. *See ante* note 21. Apparently, all of the relevant authority of which the dissent is aware supports the conclusion we reach today. As a consequence, we have no difficulty holding that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*.

2.

Having concluded that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, our next step ordinarily would be to remand the case for a determination of whether Dickerson's confession was voluntary. That is unnecessary in this case, however, because the district court has already made that finding.

Although the district court suppressed the statements obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, *e.g.*, the statement made by Rochester identifying Dickerson as the getaway driver. In making this determination, the district court stated that it was bound by this Court's decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997). *See United States v. Dickerson*, 971 F. Supp. 1023, 1024 n.1 (E.D. Va. 1997). In *Elie*, we held that evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Therefore, by declining to suppress the evidence found as a result of Dickerson's unwarned statements, the district court necessarily found that Dickerson's statements were voluntary under the Fifth Amendment. [Page 43]

During oral argument, Dickerson's counsel contended that the district court erred in finding that the statements in question were voluntary for purposes of the Fifth Amendment. The district court's finding on this matter, however, is currently unreviewable. *See, e.g., United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994) (noting that the denial of a motion to suppress is not an appealable final order).

IV.

On appeal, the Government also contends that the district court erred in suppressing the fruits of the warrant-authorized search of Dickerson's apartment. The district court concluded that the warrant was insufficiently particular in describing the items to be seized. Moreover, the district court concluded that the agents executing the warrant could not have acted in good-faith because the warrant was facially deficient. We address these two rulings in turn.

A.

The warrant in question was obtained by Special Agent Lawlor via the telephone pursuant to Rule 41(c)(2) of the Federal Rules of Criminal Procedure. In his sworn oral testimony to Judge Kenkel, Special Agent Lawlor described the circumstances of the bank robbery, including that the robber used a handgun, carried a bag, requested unmarked bills, and left the scene in a car registered to Dickerson. In the section of the warrant used to identify the property to be seized, Special Agent Lawlor wrote: "Evidence of the crime of bank robbery." Whether that description, coupled with the description contained in Special Agent Lawlor's oral testimony, is sufficiently particular to pass constitutional scrutiny is a legal issue subject to de novo review. *See United States v. Hyppolite*, 65 F.3d 1151, 1156 (4th Cir. 1995).

The Fourth Amendment provides that a search warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Supreme Court has identified two important purposes underlying the particularity requirement: (1) preventing general searches, and (2) ensuring that the executing officer is able to distinguish between those items which are to be [Page 44] seized and those that are not. *See Marron v. United States*, 275 U.S. 192, 196 (1927).

The Government argues that the warrant neither authorized an improper general search nor left to the discretion of the agents executing the warrant what to seize. Specifically, the Government contends that the warrant directed the agents to search for evidence of a particular crime—bank robbery—that tends to generate quite distinctive evidence, *e.g.*, guns, masks, bait money, dye-stained bills and clothes, carrying bags. The test for the

necessary particularity of a search warrant is "a pragmatic one: The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved." *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir. 1979) (internal quotation marks omitted).

Some courts uphold warrants that identify the items to be seized as "evidence of [specific crime]" only "where a more precise description was not possible in the circumstances." *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (citing cases). Here, the Government admits, as it must, that it could have been more precise, but argues that this Court has routinely upheld warrants directing the police to search for evidence of a particular crime. *See* Appellant's Br. at 36-37 (citing *United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986), and *United States v. Ladd*, 704 F.2d 134 (4th Cir. 1983)).

As the Government correctly notes, the law of this Circuit does allow some discretion to the officers executing a search warrant, so long as the warrant at least minimally "confines the executing officers' discretion by allowing them to seize only evidence of a particular crime." *Fawole*, 785 F.2d at 1144. For example, in *Ladd* we upheld a warrant directing the police to seize all property relating to "the smuggling, packing, distribution, and use of controlled substances," as satisfying fully the particularity requirement. 704 F.2d at 136. Indeed, the panel in *Ladd* specifically held that "[m]ore specificity is not required by the Constitution." *Id.; see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.6(d), at 567 & n.81 (3d ed. 1996) (noting that "[s]ometimes a warrant will not attempt to describe instrumentalities except by reference to the criminal conduct in which they have been used") (collecting cases). [Page 45]

As explained by the Second Circuit in *George*, a warrant authorizing a search for evidence relating to "a broad criminal statute or general criminal activity" such as "wire fraud," "fraud," "conspiracy," or "tax evasion," is overbroad because it "provides no readily ascertainable guidelines for the executing officers as to what items to seize." 975 F.2d at 76. In contrast, a warrant authorizing a search for evidence relating to "a specific illegal activity," such as "narcotics," or "theft of fur coats" is sufficiently particular. *Id.* (citing cases). The warrant in the instant case limited the agents' search to evidence relating to the commission of a particular crime: bank robbery. Bank robbery is a specific illegal activity that, as the Government notes, generates quite distinctive evidence. Though certainly broad in its description, we cannot say that the warrant failed to provide that degree of specificity required by the precedent of this Court.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves.[23] Rather than conducting an impermissible fishing expedition, it is clear that the agents conducting the search only seized those items reasonably associated with the crime of bank robbery. Thus, it is evident that the warrant was sufficiently definite so that the agents executing it were able to identify the property sought with reasonable certainty. As a consequence, we conclude that "evidence of the crime of bank robbery" adequately distinguishes between those items which are to be seized and those which are not. *See Marron*, 275 U.S. at 196.

In sum, the nature of a bank robbery is such that the evidence thereof is reasonably subject to identification. Since "[t]he degree of specificity required when describing

---

[23] The agents also found a small quantity of drugs in plain view.

the goods to be seized . . . var[ies] according to the . . . type of items involved," *Torch*, 609 F.2d at 1090, we have little difficulty concluding that the warrant was sufficiently particular in describing the items to be seized.

B.

Moreover, even if we assume that the warrant was not sufficiently [Part 46] particular in describing the items to be seized, we nevertheless would conclude that the evidence obtained during the search of Dickerson's apartment was admissible pursuant to the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 913 (1984). In deciding whether the good faith exception applies, this Court must consider "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. This inquiry is objective in nature, depending upon the understanding of a reasonable officer in light of the totality of the circumstances. *See Hyppolite*, 65 F.3d at 1156.

In light of the totality of the circumstances, we conclude that the warrant in this case was not so facially deficient as to preclude reasonable reliance upon it. First, the warrant specified that the items to be seized consisted of evidence associated with bank robbery. Thus, it did not fail to provide the searching officers any guidance whatsoever as to the subject of the search.

Second, this Court considers the knowledge of the searching officers in assessing the objective reasonableness of reliance upon a warrant. *See United States v. Curry*, 911 F.2d 72, 78 (8th Cir. 1990) (noting that "in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position would have possessed"). Agent Wenko, who was the lead agent during the search of Dickerson's apartment, was familiar not only with the specifics of the bank robbery in question, but, perhaps as important, had been investigating bank robberies for seven years and thus was very familiar with the type of evidence to look for (*e.g.*, guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves).

For the foregoing reasons, we conclude that the district court erred in finding that the agents could not have acted in good-faith reliance on the warrant.

V.

In conclusion, we find that the admissibility of confessions in federal court is governed by 18 U.S.C.A. § 3501 (West 1985), rather than [Page 47] *Miranda*, that the warrant was sufficiently particular in describing the items to be seized, and that the officers executing the warrant acted in good faith. Accordingly, the district court's order suppressing the statements Dickerson made at the FBI Field Office and the physical evidence obtained during the search of his apartments is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

MICHAEL, Circuit Judge, dissenting in part and concurring in part:

Thirty years have passed since Congress enacted 18 U.S.C. § 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use § 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that § 3501 must be invoked. After making that judgment call, the majority holds that the section is constitutional, without the benefit of any briefing in opposition. In pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should. I therefore respectfully dissent from the parts of the majority opinion that deal with § 3501. As for the search warrant, I would uphold it under *Leon*'s good faith exception, but I dissent from the holding that the warrant is sufficiently specific.

I.

The majority begins its reach to inject § 3501 into this case with an overstatement. It says that the § 3501 issue is "squarely presented." Ante at 2; *see also* ante at 4 ("the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today"). In its brief to us the government has said plainly, "we are not making an argument based on § 3501 in this appeal." Appellant's Opening Br. at 34. The defendant, of course, does not mention § 3501. Thus, we are not being urged to inject § 3501 into this case by anyone except the *amici*, the Washington Legal Foundation and the Safe Streets Coalition. That is not enough to put the issue of § 3501's constitutionality and application squarely before us. Perhaps [Page 48] the majority recognizes as

much, for it quickly moves to an argument about why the court itself should force § 3501 into this case.

The majority's argument for taking up § 3501 is as follows. First, the Department of Justice will not defend the constitutionality of § 3501, so the question whether the statute or *Miranda* governs the admission of federal confessions will not be decided unless we act on our own. Second, Dickerson's confession in this case is admissible under § 3501 but not under *Miranda*. "As a result," the majority concludes, "we are *required* to consider the issue now." Ante at 26 (emphasis added). One thing I am sure of is that we are not required to consider a § 3501 issue when it is raised only in an *amicus* brief. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994) ("declin-[ing] the invitation of some *amici* to consider" § 3501). Indeed, the only issues not raised by the parties that we are required to consider are those of subject matter jurisdiction and justiciability. *See e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977) ("we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction"); *Juidice v. Vail*, 430 U.S. 327, 331 (1977) ("Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III"); *LaFaut v. Smith*, 834 F.2d 389, 394-95 n.9 (4th Cir. 1987) (concluding that whether a claim is moot "is a jurisdictional question that the court is obliged to consider *sua sponte* whenever it arises") (citations omitted). We have jurisdiction in this case, and it is fit for adjudication. The real question, therefore, is whether we should exercise our discretion and consider § 3501, when no party has invoked the statute. I believe that the situation calls for the exercise of judicial restraint, we should stay away from the § 3501 issue.

To start with, I cannot agree with the majority's accusation that the Department of Justice "elevat[ed] politics over law" when it prevented the United States Attorney from invoking § 3501 in an effort to save Dickerson's confession. *See* ante at 4. A move to admit more confessions could be touted as aggressive prosecution, so I would think it might be better politics to invoke § 3501. In any event, I see no evidence that the Department of Justice is putting politics over law when it comes to § 3501. The Department's view—that § 3501 cannot be [Page 49] used to admit confessions that *Miranda* would exclude—is a view that I accept as genuine.

I believe that *Davis v. United States*, 512 U.S. 452 (1994), remains sound authority for us to decline consideration of §3501 on the invitation of an *amicus*. In *Davis* the Court did not take up § 3501 because "the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position." *Id.* at 457 n.*. Our panel majority says that everything has changed since *Davis* because the Attorney General has now written Congress, saying that the Department of Justice will not defend the constitutionality of § 3501. *See* ante at 3-4, 25. I do not think the Attorney General's letter changes anything. It simply confirms what the Supreme Court already knew in *Davis*, that is, that the Department of Justice was not going to invoke the statute to try to salvage confessions. *See Davis*, 512 U.S. at 463 (Scalia, J., concurring) ("This is not the first case in which the United States has declined to invoke § 3501 before us—nor even the first case in which that failure has been called to its attention."). The majority also contends that *Davis* is distinguishable because the Supreme Court saved that confession on another ground, making consideration of § 3501 unnecessary. That is not why the Court declined

to consider § 3501. The Court said specifically "that the Government has not sought to rely in this case on 18 U.S.C. § 3501, . . . and we therefore decline the invitation of some amici to consider it." *Davis*, 512 U.S. at 457 n.*. *See also id.* at 462 n.* ("the Court today bases its refusal to consider § 3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it") (Scalia, J., concurring). Thus, we are faced with essentially the same situation that the Supreme Court confronted in *Davis* when it refused to take up § 3501: the government has expressly declined to "mak[e] an argument based on § 3501 in this appeal," Appellant's Opening Br. at 34, and we are free to reject *amici*'s call for its consideration.

It is a mistake for our court to push § 3501 into this case for several reasons. First, courts as a general rule do not interfere with the executive's broad discretion in the initiation and conduct of criminal prosecutions. *See generally United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996); *United States v. Juvenile Male J.A.J.*, 134 F.3d 905, 907 (8th Cir. 1998). Forcing the use of § 3501 upon a United States Attorney [Page 50] gets uncomfortably close to encroaching upon the prosecutor's routine discretion. I recognize, of course, that courts have a large measure of control over the course of a case once it is filed. But a decision not to invoke § 3501 in response to a motion to suppress a confession is a matter of prosecutorial strategy. We should leave that to the executive. There is also a related point. In invoking § 3501, the majority overrides 30 years of Department of Justice prosecutorial policy. Any change in this policy should come from Justice.

Second, it is "a sound prudential practice" for us to avoid issues not raised by the parties. *See Davis*, 512 U.S. at 464 (Scalia, J., concurring). This is because

"[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). We perform our role as neutral arbiter best when we let the parties raise the issues, and both sides brief and argue them fully. That did not happen here. By invoking § 3501, the majority injects into this case the overriding constitutional question of whether § 3501 can supersede *Miranda*. It then decides the question against the defendant, when the only briefing we have on the issue is about two pages from *amici* that the majority agrees with. The majority holds that § 3501 governs the admissibility of confessions in federal court because *Miranda* is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on *both* sides to answer one question for me. If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? *See, e.g., Stansberry v. California*, 511 U.S. 318 (1994) (per curiam); *see also Mu'Min v. Virginia*, 500 U.S. 415, 422 (1996) (noting that with respect to cases tried in state court, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution"). This question illustrates that the § 3501 issue is so sweeping that we should not be delving into it on our own. In this case, we should follow our usual practice of deciding only the issues raised by the parties.* [Page 51]

---

* The majority misses my point when it erroneously suggests that I have examined all of the relevant authority and cannot conclude that *Miranda* renders § 3501 unconstitutional. *See* ante at n.21, 42. My point is that we should not be examining the question at all, much less deciding it. For the record, however, not everyone agrees with the majority. *See* 1 Charles Alan Wright, Federal Practice and Procedure § 76 (2d ed. 1982) ("Unless the [Supreme] Court overrules Miranda, or holds that the 1968 statute [§ 3501] has successfully accomplished this, lower courts must follow the decision rather than the statute."); 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.5(e) (1984) (§ 3501 "is unconstitutional to the extent that it purports to repeal *Miranda*.").

The majority's fallback position is that if we do not press the use of § 3501, no one else will. *See* ante at 26. This overlooks Congress. If another branch is to question and investigate the executive's 30-year policy of not using § 3501, it should be Congress. After all, Congress—consistent with separation of powers principles—uses the public hearings process to examine the policies and conduct of the executive. That process has been used on occasion to question the executive's exercise of prosecutorial discretion and the formulation of litigation strategy. *See Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979, 991 n.8 (3d Cir. 1986). Congress therefore may legitimately investigate why the executive has ignored § 3501 and what the consequences are. The legislative branch is better equipped than we are to investigate, for example, the question raised by Justice Scalia in his concurring opinion in *Davis*: whether the government's failure to invoke § 3501 "*may* have produced . . . the acquittal and the nonprosecution of many dangerous felons." *Davis*, 512 U.S. at 465 (emphasis added). Whether the answer to that question or other considerations should be used to prod the executive into changing its policy with respect to § 3501 is a matter that I would leave to Congress.

Because I would not invoke § 3501, I would affirm the district court's order denying the government's motion to reconsider the admissibility of Dickerson's confession for the reasons stated in part II.A. of the majority opinion.

II.

As for the physical evidence seized from Dickerson's apartment, I agree with the majority's conclusion that it should have been admitted [Page 52] under the good faith exception. I respectfully disagree, however, with the majority's conclusion that a warrant permitting a search for "evidence of the crime of bank robbery" is sufficiently particular under the Fourth Amendment.

A warrant must guide the executing officer with a particular description of the items to be seized. *See United States v. Wolfenbarger*, 696 F.2d 750, 752 (10th Cir. 1982) ("A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized.") (citation omitted). Thus, a warrant authorizing seizure of "address books, diaries, business records, documents, receipts, warranty books, guns, stereo equipment, [and] color television which are evidence of violation of Georgia State Statute 16-8-2 Theft by Taking" is sufficiently particular because it identifies the universe of items to be seized. *See United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986). On the other hand, a warrant for seizure of " 'any other evidence relating to the commission of a crime' plainly is not sufficiently particular with respect to the things to be seized." *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992).

I recognize that courts on occasion have upheld warrants authorizing the seizure of the "instrumentalities" of certain distinctive crimes. Nevertheless, I believe "evidence of the crime of bank robbery" is far too general. That description does nothing to confine the discretion of an executing officer, especially if the warrant is relayed for execution by an officer who has never served on a bank robbery squad. A search for evidence of bank robbery would surely include a search for guns, masks, and

cash. But what else? It might be construed to allow a search through all financial records, as well as a search for any items purchased. Under this interpretation, virtually no piece of paper or property would be beyond the bounds of a search. The description in the warrant here was simply too general to satisfy Fourth Amendment standards.

FILED April 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

CORRECTED ORDER

The appellee filed a petition for rehearing and rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc.

Judges Murnaghan, Ervin, Michael, Motz, and King voted to rehear the case en banc. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, and Traxler voted to deny rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Williams for the Court.

FOR THE COURT

/s/ Patricia S. Connor
Clerk

FILED April 14, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

ORDER

Appellee filed a motion to recall and stay the mandate in this matter pending the filing of a petition for writ of certiorari to the United States Supreme Court pursuant to FRAP 41(d).

The Court grants the motion.

FOR THE COURT

/s/ Patricia S. Connor
Clerk

Jan 28 2000

(1)

No. 99-5525

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

IN THE
Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES W. HUNDLEY *
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

PAUL F. WASHINGTON
75 Rockefeller Plaza
New York, New York 10019
(212) 484-6753

Counsel for Petitioner

* Counsel of Record

January 28, 2000

58 pp

QUESTION PRESENTED

Whether Congress' enactment of 18 U.S.C. § 3501 constitutes an unconstitutional attempt legislatively to narrow the protections in the Self-Incrimination Clause of the Fifth Amendment embodied in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	4
B. Procedural Background	6
C. Statutory Background	9
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. *MIRANDA* ENUNCIATED A CONSTITUTIONAL RULE THAT CANNOT BE REVERSED BY CONGRESS	13
A. *Miranda*'s Core Constitutional Holdings	13
B. The Court's Subsequent Application Of *Miranda* To The States And On Habeas	20
C. *Miranda*'s "Prophylactic" Rules Have Constitutional Weight	22
D. Section 3501 Is Constitutionally Infirm	27
II. THERE IS NO REASON TO DISLODGE *MIRANDA*'S CONSTITUTIONAL RULING	30
A. Workability	31

TABLE OF CONTENTS—Continued

	Page
B. Reliance	33
C. Subsequent Doctrinal Developments	34
D. Unchanged Factual Premises	36
E. *Miranda* Is Not "Unsound In Principle"	37
F. Considerations That Transcend Traditional Factors	44
CONCLUSION	46

TABLE OF AUTHORITIES

CASES

	Page
Arizona v. *Roberson*, 486 U.S. 675 (1988)	21
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	32, 34
Blackburn v. *Alabama*, 361 U.S. 199 (1960)	41
Blackledge v. *Perry*, 417 U.S. 21 (1974)	26
Bram v. *United States*, 168 U.S. 532 (1897)	41
Butler v. *McKellar*, 494 U.S. 407 (1990)	20
Carter v. *Kentucky*, 450 U.S. 288 (1981)	40
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	29
Colorado v. *Connelly*, 479 U.S. 157 (1986)	41
Cooper v. *Dupnik*, 963 F.2d 1220 (9th Cir. 1992)	36
Culombe v. *Connecticut*, 367 U.S. 568 (1961)	41
Davis v. *United States*, 512 U.S. 452 (1994)	10, 35
Doe v. *United States*, 487 U.S. 201 (1988)	40
Edwards v. *Arizona*, 451 U.S. 477 (1981)	20, 34
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	15, 27
Fare v. *Michael C.*, 442 U.S. 707 (1979)	32
Freedman v. *Maryland*, 380 U.S. 51 (1965)	25
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	31, 37
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	24
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	15, 40
Greenwald v. *Wisconsin*, 390 U.S. 519 (1968)	41
Griffin v. *California*, 380 U.S. 609 (1965)	40
Harris v. *Rivera*, 454 U.S. 339 (1981)	21
Illinois v. *Perkins*, 496 U.S. 292 (1990)	20
Lisenba v. *California*, 314 U.S. 219 (1941)	41
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)	26
Maine v. *Moulton*, 474 U.S. 159 (1985)	26
Malloy v. *Hogan*, 378 U.S. 1 (1964)	15
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	30
Massiah v. *United States*, 377 U.S. 201 (1964)	15, 28
McNabb v. *United States*, 318 U.S. 332 (1943)	21
Michigan v. *Harvey*, 494 U.S. 344 (1990)	27, 32, 34
Michigan v. *Jackson*, 475 U.S. 625 (1986)	20, 26, 27
Michigan v. *Payne*, 412 U.S. 47 (1973)	26
Michigan v. *Tucker*, 417 U.S. 433 (1974)	17, 21, 23, 35

TABLE OF AUTHORITIES—Continued

	Page
Mincey v. *Arizona*, 437 U.S. 385 (1978)	41
Minnick v. *Mississippi*, 498 U.S. 146 (1990)	21, 29, 34, 35, 37
Miranda v. *Arizona*, 384 U.S. 436 (1966)	*passim*
Mitchell v. *United States*, 119 S. Ct. 1307 (1999)	44
Moran v. *Burbine*, 475 U.S. 412 (1986)	20, 32, 45
Mu'Min v. *Virginia*, 500 U.S. 415 (1991)	21
New York v. *Quarles*, 467 U.S. 649 (1984)	24, 32, 36
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1954)	24
North Carolina v. *Pearce*, 395 U.S. 711 (1969)	26
Oregon v. *Elstad*, 470 U.S. 298 (1985)	21, 24, 25, 35
Oregon v. *Haas*, 420 U.S. 714 (1975)	25
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	31, 34
Payne v. *Arkansas*, 356 U.S. 560 (1958)	41
Payne v. *Tennessee*, 501 U.S. 808 (1991)	30, 31
Pennsylvania v. *Muniz*, 496 U.S. 582 (1990)	34
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992)	30, 31, 33, 36, 45
Rhode Island v. *Innis*, 446 U.S. 291 (1980)	32
Rock v. *Arkansas*, 483 U.S. 44 (1987)	40
Stansbury v. *California*, 511 U.S. 318 (1994)	21
Tennessee v. *Street*, 471 U.S. 409 (1985)	25
United States v. *Balsys*, 118 S. Ct. 2218 (1998)	38, 39, 43
United States v. *International Bus. Mach. Corp.*, 517 U.S. 843 (1996)	30
United States v. *Leon*, 468 U.S. 897 (1984)	25
United States v. *Title Ins. & Trust Co.*, 265 U.S. 472 (1924)	31
Vasquez v. *Hillary*, 474 U.S. 254 (1986)	30, 31
Weaver v. *Brenner*, 40 F.3d 527 (2d Cir. 1994)	36
Withrow v. *Williams*, 507 U.S. 680 (1993)	22, 40
Wong Sun v. *United States*, 371 U.S. 471 (1963)	28

CONSTITUTION

U.S. Const. amend. V	2, 38

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES

	Page
2 U.S.C. § 288k(b)	10
18 U.S.C. § 3501	2, 9, 28
28 U.S.C. § 2254(a)	22

CONGRESSIONAL HISTORY

114 Cong. Rec. 16,074 (1968)	10
114 Cong. Rec. 16,295 (1968)	10
S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112	10, 27

SCHOLARLY AUTHORITIES

Stephen I. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987)	14
Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 Cornell L. Rev. (forthcoming 2000)	28

OTHER AUTHORITIES

Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination* 181 (R.H. Helmholz et al. eds., 1997)	39, 40
Joan Biskupic, *High Court to Reconsider Miranda Ruling*, Wash. Post, Dec. 7, 1999, at A1	4
Michael Dorman, *Imagine You're Arrested. First They Read Your Rights. (Right?)*, Newsday, Oct. 14, 1999, at A25	4
Charles M. Gray, *Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries, in The Privilege Against Self-Incrimination* 47 (R.H. Helmholz et al. eds., 1997)	40
Orrin G. Hatch, *Miranda Warnings and Voluntary Confessions Can Co-Exist*, Wall St. J., Dec. 13, 1999, at A35	4
R.H. Helmholz, *Introduction, in The Privilege Against Self-Incrimination* 1 (R.H. Helmholz et al. eds., 1997)	39

TABLE OF AUTHORITIES—Continued

Page

R.H. Helmholz, *The Privilege and the Jus Commune: The Middle Ages to the Seventeenth Century, in The Privilege Against Self-Incrimination* 17 (R.H. Helmholz et al. eds., 1997) 40

John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in The Privilege Against Self-Incrimination* 82 (R.H. Helmholz et al. eds., 1997) 39, 40

Tony Mauro, *Supreme Court Agrees to Revisit Miranda Warning*, USA Today, Dec. 7, 1999, at 4A 4

Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination* 109 (R.H. Helmholz et al. eds., 1997) 38, 39

Stephen Seplow, *Miranda Rights Case Revisited*, Dayton Daily News, Nov. 25, 1999, at 2A 4

Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins, in The Privilege Against Self-Incrimination* 145 (R.H. Helmholz et al. eds., 1997) 38

IN THE

Supreme Court of the United States

No. 99-5525

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 166 F.3d 667 (4th Cir. 1999), and is reproduced in the Joint Appendix (J.A.) at 162-225. That opinion reversed an unpublished opinion and order of the district court, reproduced in the J.A. at 139-55. Following the district court's ruling, both the government and petitioner filed motions requesting that the district court reconsider aspects of its initial ruling. J.A. 75-85, 86-100. The district court's opinion and order denying both motions is reported at 971 F. Supp. 1023 (E.D. Va. 1997) and is reproduced in the J.A. at 156-61.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on February 8, 1999. The petitioner

filed a Petition for Rehearing and Petition for Rehearing En Banc which the Fourth Circuit denied on April 1, 1999. The Court extended the time for filing the Petition for Certiorari until July 30, 1999. The Petition for Certiorari was filed on July 30, 1999, and the Court granted the Petition for Certiorari on December 6, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V; 18 U.S.C. § 3501.[1]

STATEMENT OF THE CASE

The issue in this case is whether this Court's landmark holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which precludes admitting into evidence unwarned statements made by an individual during a custodial interrogation, is based on the Fifth Amendment and therefore beyond the power of Congress to overrule statutorily. The district court found that certain statements of petitioner, Charles Thomas Dickerson, were unwarned and therefore inadmissible under *Miranda*. The Fourth Circuit, *sua sponte*, held that Congress, in enacting § 3501, superseded *Miranda*'s warning requirements. Accordingly, the Fourth Circuit applied § 3501's "totality of the circumstances" test to determine the admissibility of petitioner's statements.

The Fourth Circuit erred. Pursuant to *Miranda* and its progeny, the Fifth Amendment's privilege against self-incrimination is not solely a privilege to be free from abuse at the station house. It is also a privilege not to become an unwitting or unwilling witness against oneself while being subjected to the pressures inherent in cus-

[1] The text of the pertinent constitutional and statutory provisions is reproduced in the Appendix ("App.") to this brief.

todial interrogation. Accordingly, *Miranda*'s minimum constitutional threshold requires that an individual be apprised of his rights, that officials respect the exercise of those rights and that any waiver be knowingly, intelligently and voluntarily made before a statement made to law enforcement officials during custodial interrogation may be admitted in the prosecution's case-in-chief.

Incriminating statements therefore are admissible only if they are made in the absence of overt coercion *and* after warnings or other procedures fully effective in apprising persons of their rights. Without knowledge on the part of the individual being questioned as to what choices are available to him, statements cannot be deemed truly voluntary. If the government is allowed to keep its suspect in a state of ignorance, the Fifth Amendment protections are reduced to a mere " 'form of words.' " *Miranda*, 384 U.S. at 444 (quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920)). Section 3501, which makes apprising an individual of his rights merely optional, directly contradicts *Miranda*'s minimum threshold requirement that an individual be apprised of his rights and that the exercise of those rights be respected. Because *Miranda*'s minimum threshold is a matter of constitutional law, and because *stare decisis* requires continued adherence to *Miranda*'s threshold requirements, § 3501 is invalid.

Given the notoriety of this matter, it should be noted at the outset that petitioner has not been (and never before has been) convicted of bank robbery in this or any other case. This matter is before the Court on a successful suppression motion and no trial has been held. Petitioner therefore is entitled to the full protections of the presumption that he is innocent. Moreover, contrary to numerous

and nationwide media reports,[2] petitioner did not confess to any bank robbery, much less "multiple" bank robberies. His "statements" concerned only his whereabouts and activities. Nor has petitioner been "let off on a technicality." Petitioner remains under indictment. At this point only the statements petitioner made in custody remain suppressed.

A. Factual Background.

The facts material to consideration of the question presented are as follows: On January 24, 1997, a First Virginia Bank in Alexandria, Virginia was robbed. Witnesses saw the robber, later identified as James Rochester, leave the bank and enter an Oldsmobile Cierra. Using the description of the getaway car, including its license plate number, the FBI determined that petitioner was the car's owner.

At approximately 5:30 p.m. on the evening of January 27, 1997, law enforcement officers went to petitioner's home in Takoma Park, Maryland. An Oldsmobile Cierra registered to petitioner was parked in the vicinity. The officers set up surveillance. After waiting for more than an hour, they knocked on petitioner's door. Approximately ten FBI agents and local police officers arrived at the door of petitioner's apartment, some with guns drawn, as he opened the door. Three or four, including Special FBI Agent Lawlor, entered petitioner's apartment without

---

[2] *See* Michael Dorman, *Imagine You're Arrested. First, They Read Your Rights. (Right?)*, Newsday, Oct. 14, 1999, at A25; Stephen Seplow, *Miranda Rights Case Revisited*, Dayton Daily News, Nov. 25, 1999, at 2A; Tony Mauro, *Supreme Court Agrees to Revisit Miranda Warning*, USA Today, Dec. 7, 1999, at 4A; Joan Biskupic, *High Court to Reconsider Miranda Ruling*, Wash. Post, Dec. 7, 1999, at A1: Orrin G. Hatch, *Miranda Warnings and Voluntary Confessions Can Co-Exist*, Wall St. J., Dec. 13, 1999, at A35.

a warrant and without his consent. The officers asked him to accompany them to the FBI field office in Washington, D.C. Only when leaving did the officers ask petitioner whether he would consent to a search of the residence. He refused and was driven by the officers to the FBI field office.

Once at the field office, Agent Lawlor and another FBI agent interviewed petitioner. He was not advised of his *Miranda* rights prior to this interrogation. Petitioner denied any knowledge of incidents that might relate to the robbery. He admitted only that he had been in the vicinity of the bank at the time it was robbed. After obtaining this statement, Agent Lawlor left the interrogation room and telephoned a United States Magistrate Judge for the District of Maryland to obtain a search warrant for petitioner's home. The warrant issued at 8:50 p.m.

After obtaining the warrant, Agent Lawlor returned to the interrogation room and told petitioner that his home was going to be searched. Petitioner then made another statement, still denying his involvement, but providing information about James ("Jimmy") Rochester, the man who had committed the robbery.[3] It was only after

---

[3] Petitioner's statement to the agent was as follows: Petitioner had gone to Alexandria on January 24, 1997, with a man named Jimmy. Petitioner knew Jimmy because Jimmy was married to petitioner's cousin. Petitioner further stated that, while in Alexandria, he parked his car and went into a bagel shop. Initially, Jimmy waited in the car, but as petitioner walked away, he saw Jimmy get out of the car. When petitioner returned to his car, Jimmy was already back in it. When petitioner began to drive away, Jimmy told him to pull over. He complied, thinking Jimmy had to use the bathroom. Jimmy got out and returned after a few minutes. When petitioner stopped at a stop sign, Jimmy got out of the car and put something in the trunk. When petitioner again stopped at a red light a short distance down the street, Jimmy told him to run it. It was at this point that petitioner began to suspect

giving this statement that petitioner was, for the first time, advised of his rights as mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This was done using a rights waiver form which petitioner signed. After completing this form, petitioner was formally placed under arrest. He then left the field office with the agents and showed them Rochester's apartment in Oxon Hill, Maryland. Based on this information, the FBI arrested James Rochester, who was a suspect in connection with a number of bank robberies in various states on the east coast. Following his arrest, James Rochester admitted that he had robbed several banks, including the First Virginia Bank in Alexandria on January 24, 1997. Petitioner was charged with one count of conspiracy to commit bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and three counts of using a firearm during a bank robbery in violation of 18 U.S.C. § 924(c).[4]

B. Procedural Background.

Petitioner filed a motion to suppress the statements given at the FBI field office. After careful examination of the facts as presented by both petitioner and the prosecution, the district court granted the motion. Regarding the statements, the district court observed that Agent Lawlor had obtained a search warrant for petitioner's residence at 8:50 p.m. At the suppression hearing, Agent Lawlor testified that when he informed petitioner about the warrant, petitioner reacted by saying he wanted to make a further statement. It was at this point, Agent

---

that Jimmy may have committed a robbery. Petitioner knew that Jimmy had come to the Washington, D.C. area after committing a number of robberies in Georgia.

[4] A superseding indictment was issued on June 24, 1997. It charged the same offenses except it alleged that petitioner acted as an aider and abettor to the bank robberies and firearm offenses in violation of 18 U.S.C. § 2. *See* J.A. 27.

Lawlor said, he "Mirandized" petitioner and obtained a signed waiver form. Although, at most, only a few minutes had passed since the warrant was issued, the time written on petitioner's waiver form was 9:41 p.m. The district court found that "Agent Lawlor's testimony is in direct conflict with the documentary evidence, which shows that the warrant issued at 8:50 p.m., and [petitioner's] testimony that he was Mirandized at the end of 'a half hour' long interview." J.A. 155. The court suppressed petitioner's statements, finding that Dickerson was not advised of his *Miranda* rights until after he had completed his statement." *Id.*[5]

The parties filed cross-motions for reconsideration, which the district court denied. J.A. 75-85, 86-100.[6] The

---

[5] Central to the district court's ruling was its finding that "the content of Agent Lawlor's testimony, which was impeached by the government's own exhibits, and his demeanor lacked credibility." J.A. 152 n.7. As an example, the court observed that Agent Lawlor "dodged questions" about whether officers entered petitioner's home with their guns drawn, even though the officers had taken an hour to plan their entry and after petitioner had initially stalled when the officers first knocked and announced themselves. *Id.* Agent Lawlor also testified that petitioner was not under arrest when this group of officers took him from Maryland to the FBI field office in Southwestern D.C. and therefore *Miranda* warnings were unnecessary. The district court specifically noted that it made a "first hand assessment of witness credibility, based on demeanor, voice inflection and a totality of other factors not well reflected by an inanimate record, for which the district court is uniquely suited." *Id.* (citing cases).

[6] In their cross-motion, prosecutors attached an affidavit from Agent Durkin that contradicted Agent Lawlor's testimony. J.A. 101-04. The affidavit stated that petitioner had initially refused to give a statement after Agent Lawlor told him about the warrant, and that petitioner did not make a statement until after the search was concluded. *Id.* at 102-03. Prosecutors also attached a handwritten statement from petitioner (separate from the "9:41 pm" waiver form) in which petitioner wrote that he had been read his rights at 7:30 pm and denied involvement. *Id.* at 105. This statement, however, is plainly incorrect as to time in that petitioner also

district court did not address § 3501 in either of its orders, nor did it make any specific finding as to whether petitioner's statements were voluntary.

A divided panel of the Fourth Circuit Court of Appeals reversed the district court. The Fourth Circuit held that it had discretion to consider § 3501's applicability, despite the fact that no party had raised the issue. In explaining this unusual exercise of discretion, the court of appeals observed that in recent years "career prosecutors" (but not the Department of Justice), political groups and politicians had repeatedly urged the court of appeals to address § 3501. J.A. 188 ("[T]he Washington Legal Foundation and the Safe Streets Coalition . . . . took the government to task . . . . As a result, we ordered the Department of Justice to address the effect of § 3501.") (citing *United States* v. *Leong*, 116 F.3d 1474 (4th Cir. 1997) (table)). In the instant case, because the Department of Justice had expressed its view that § 3501 was unconstitutional, and in order to ensure " 'the proper administration of the criminal law,' " *id.* at 189, the Fourth Circuit determined it would accede to the urgings of *amici*.

In examining *Miranda*, the Fourth Circuit was surprised that "the sixty-page opinion does not specifically state the basis for its holding." J.A. 202. The court, however, found that the opinion "strongly suggested . . . that the basis for the rule was identical to that set forth in *McNabb* and *Malloy*," *id.*, *i.e.*, an exercise of the Court's

---

states he was brought to the FBI field office at 5:30 p.m. Officers only arrived at petitioner's apartment at 5:30 pm and did not knock and enter until "over an hour" later. Though the times given in the statement are demonstrably inaccurate, the statement is consistent with petitioner's tesimony that there was a two-hour gap between petitioner's arrival at the field office and his being apprised of his rights. In denying the cross-motion, the district court ruled that the government had not proffered any "new and heretofore unavailable evidence supporting reversal of this Court's July 1, 1997 Order." *Id.* at 161.

power "to prescribe nonconstitutional 'rules of procedure and evidence.' " *Id.* at 200 (quoting *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959)).

The Fourth Circuit conceded that Congress, in enacting § 3501, had the "express purpose of returning to the pre-*Miranda* case-by-case determination of whether a confession was voluntary." J.A. 199. Nonetheless, the court of appeals concluded that Congress had the authority to do so. In addition to the court of appeal's conclusion that *Miranda*'s holding was an exercise of only supervisory powers, the Fourth Circuit also cited subsequent cases from the Court describing *Miranda*'s rules as "prophylactic." *Id.* at 203-07. However, the Fourth Circuit cited only its own opinion in declaring that "it is certainly 'well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation.' " *Id.* at 207 (quoting *United States* v. *Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997)). In response to the dissent's objection that *Miranda*'s application in state cases proves its constitutional force, the Fourth Circuit merely said "the dissent raises an interesting academic question." *Id.* at 208 n.21.

C. Statutory Background.

Congress enacted 18 U.S.C. § 3501 on June 19, 1968, just two years after the Court issued *Miranda*. Under § 3501, whether a confession is "voluntarily given" and therefore admissible is to be determined by the trial judge, "tak[ing] into consideration all the circumstances surrounding the giving of the confession." *Id.* § 3501(b). On its face, the statute directly conflicts with *Miranda*'s holding that a statement made in custodial interrogation is inadmissible unless "the accused [is] adequately and effectively apprised of his rights and the exercise of those rights [is] fully honored." 384 U.S. at 467. This conflict was intentional. Congress enacted § 3501 to replace *Miranda*'s standard for determining whether a statement is

admissible under the Fifth Amendment with a broader totality of the circumstances test. See S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2141; see *id.* at 2210-11.

Congress also left no doubt that *Miranda*'s holding that the accused be apprised of his rights was a matter of constitutional interpretation. The Senate Judiciary Committee expressed its view that *Miranda*'s "majority opinion . . . misconstrues the Constitution." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. at 2136. Section 3501 further reflected the mistaken view that Congress could override the Court on such constitutional rulings: "I say that we would be derelict in our duty if we as Representatives of the people did not declare once and for all the equality of this Congress of the United States with the Supreme Court of the United States and put the Court in its place." 114 Cong. Rec. 16.074 (1968) (statement of Rep. Whitten); see *id.* at 16.295 (statement of Rep. Reid) ("In my judgment, this title constitutes an emotional backlash at the Supreme Court").

Precisely because of § 3501's unconstitutionality, the Executive Branch has largely refused to enforce it since it was enacted over thirty years ago. See *Davis* v. *United States*, 512 U.S. 452, 463-64 (1994) (Scalia, J. concurring) (noting that "[i]n fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment 25 years ago"). Pursuant to 2 U.S.C. § 288k(b) (requiring the Department of Justice to notify Congress whenever it will not defend the constitutionality of a federal statute), Attorney General Janet Reno has notified Congress that the Department will not defend the constitutionality of § 3501. See J.A. 188. For the past 33 years, therefore, *Miranda*, not § 3501.

has governed the admissibility at trial of statements procured during custodial interrogation.

SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court engaged in a conventional exercise of constitutional interpretation. The Court held that the Fifth Amendment privilege against self-incrimination is fully applicable to custodial interrogation. After reviewing the scope of the privilege, the Court concluded that it secures for individuals the right to make a free, intelligent choice regarding whether to talk, or not talk, to law enforcement officers during interrogations. Therefore, to permit a full opportunity to exercise the privilege and to overcome pressures inherent in the custodial interrogation process, the privilege requires that there be procedures fully effective in apprising persons *prior to* interrogation of their right to remain silent and ensuring that attempts to exercise the privilege *during* interrogation are fully honored. To provide "constitutional guidelines," the Court set forth specific warnings that must be given prior to interrogation and procedures that must be followed during interrogation as a constitutional minimum. The Court held that these measures, or other procedures at least as effective in apprising persons of their right to remain silent and assuring that exercise of such rights would be honored, must be provided to give effect to the privilege.

In subsequent years, the Court has continued to refer to *Miranda*'s specific requirements as constitutionally based. The Court has also applied *Miranda*'s holding to myriad cases arising in state courts, and on habeas review. While the Court has sometimes referred to these requirements as "prophylactic rules," it cannot be that they are not required by the Constitution. "Prophylactic" is not a synonym for "non-constitutional." If it were,

then for 33 years the Court has violated federalism and acted lawlessly in requiring States to comply with *Miranda*'s rules and numerous other prophylactic rules that are not required by the Constitution. Because *Miranda*'s rules have been applied against the States and are constitutionally required, neither Congress nor the States may ignore them. Section 3501 utterly fails to comply with *Miranda*'s constitutional rules. It fails to provide the warnings and additional procedures specified in *Miranda*, and makes no provision whatsoever for procedures at least as effective in apprising individuals of their right to remain silent and assuring that exercise of the right will be honored. Section 3501 is therefore unconstitutional.

Only the Supreme Court may alter *Miranda*'s requirements, and 33 years after *Miranda* was decided, principles of *stare decisis* counsel against doing so. *Miranda* has proved to be workable, is a ruling on which there has been considerable reliance and has not been overtaken by doctrinal developments or changes in its factual underpinnings. *Miranda* is a well-reasoned, principled decision. Moreover, it is one of the Court's most famous opinions of the twentieth century. *Miranda*'s specific holdings have been widely popularized through the media and accepted in the legal culture. Departing from them would erode public confidence in the legitimacy of the criminal justice system and the legitimacy of the Court's exercise of its authority.

ARGUMENT

I. *MIRANDA* ENUNCIATED A CONSTITUTIONAL RULE THAT CANNOT BE REVERSED BY CONGRESS.

A. *Miranda*'s Core Constitutional Holdings.

This Court's decision in *Miranda* was, first and foremost, a construction and analysis of what the Fifth Amendment requires in the context of custodial interrogations. In deciding *Miranda*, the Court was doing more than "judicially creat[ing] rules of evidence and procedure that are not required by the Constitution." J.A. 200. Rather, it announced three core constitutional holdings. *First*, the Court held that the Fifth Amendment "privilege [against self-incrimination] is fully applicable during a period of custodial interrogation." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

Second, the Fifth Amendment prohibition against compelled self-incrimination requires that the decision whether to speak to officers while in custody must be proven to be both intelligently made and entirely voluntary. Accordingly, interrogating officials must inform the individual of his rights and provide assurances that the individual's decision will be honored.

Third, the *Miranda* Court elaborated on the nature and content of the "concrete constitutional guidelines for law enforcement agencies and courts to follow," *id.* at 442, specifying the information that must be provided as a minimum constitutional threshold. Specifically, the Court held:

> [*p*]*rior to any questioning*, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, *provided the*

> *waiver is made voluntarily, knowingly and intelligently*. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning*. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, *the police may not question him*.

Id. at 444-45 (emphases added).

While the Court did not insist that its own wording of the warnings must be followed, it expressly held that alternative procedures must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467; see also *id.* at 444 (specifying either the Court's "procedural safeguards" or "other fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *id.* at 476 (specifying the Court's warnings or "a fully effective equivalent" to warn accused of rights and protect exercise thereof); *id.* at 478-79 (same); *id.* at 490-91 (same). Thus, these protections are part of our irreducible minimum protection embraced by the privilege against self-incrimination in the Fifth Amendment.

Too often, analyses of the *Miranda* decision focus on the precise formulation of the now famous warnings and fail to address the carefully crafted constitutional analysis which led to the rule.[7] While the Court invited alternative procedures, it did not invite procedures that dispensed with apprising persons in custody at the outset of their rights and assuring that their exercise of those rights would be honored. Moreover, the Court expressly rejected an after the fact "totality of the circumstances" test. Such procedures (including what Congress ultimately passed in

[7] *See generally* Stephen I. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987).

§ 3501) are constitutionally infirm because, even where an individual may be otherwise aware of his rights, warnings are nonetheless required for the individual must be assured by his interrogators that they will respect his exercise of his rights.

1. The Court's first core constitutional holding was to confirm that "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.* at 467. In reaching this conclusion, the Court clarified issues raised in its prior holdings in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). See *Miranda*, 384 U.S. at 440, 463-66.[8] The Court held that "all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.* at 461, finding that the "question, in fact, could have been taken as settled in federal courts almost 70 years ago,

[8] In *Malloy* v. *Hogan*, the Court squarely held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States," 378 U.S. 1, 6 (1964), and therefore applied to an "interrogation" of the petitioner conducted as part of a state "inquiry" into alleged criminal activities. *Id.* at 12-14. One week later, in *Escobedo* v. *Illinois*, the Court held inadmissible all statements extracted during an interrogation where the accused had requested and been refused an opportunity to consult with counsel and had not been warned of his constitutional right to remain silent, finding that the accused had been denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments. 378 U.S. 478, 490-91 (1964). Among the prior opinions relied on in reaching this conclusion were the Court's holding in *Gideon* v. *Wainwright*, 372 U.S. 335, 342 (1963), that the Sixth Amendment applied to the states, and its holding in *Massiah* v. *United States*, 377 U.S. 201, 204 (1964), that the Sixth Amendment right to the aid of counsel applied "to an indicted defendant under interrogation by police in a completely extrajudicial proceeding."

when, in *Bram* v. *United States*, 168 U.S. 532, 542 . . . (1897), this Court held: '. . . wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person "shall be compelled in any criminal case to be a witness against himself." ' " *Id.* (second omission in original). The Court, however, granted certiorari in *Miranda* to address "problems" exposed in "debate" engendered by *Escobedo*, regarding "applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines" regarding such application. *Id.* at 440-41.

2. The Court's second core holding was that the Fifth Amendment requires that statements made during custodial interrogation are inadmissible at trial in the prosecution's case-in-chief unless, before making those statements, "the accused [is] adequately and effectively apprised of his rights and the exercise of those rights [is] fully honored." *Id.* at 467. This second holding emerged from the Court's lengthy review of the history of the privilege, see *id.* at 458-66. The Court emphasized that a decision to make a statement in any situation in which an individual has become a "suspect" or "the accused" must both be intelligently made and unfettered. See *id.* at 460 ("the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own free will' " (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964))); see also *id.* at 468 (the decision must be "intelligent"). Simply put, no decision is intelligently made where the decider is ignorant of the available options, and no choice is voluntary where an inquisitor withholds critical information about the choice.

The *Miranda* Court further recognized the simple reality that compulsion may come in many forms, not only those

traditionally associated with plainly unconstitutional "third degree" tactics. Instead, the risk of compulsion is inherent in any proceeding where an accused has been deprived of his freedom, taken to a strange place and subjected to questioning by those trained to elicit answers. When the subject of such a proceeding makes a decision to speak, the voluntariness—and reliability—of such a decision is suspect unless it can be shown that the subject had been made aware that he was free to do otherwise. This is true "whatever the background of the person interrogated," for even one who is aware of his rights needs reassurance that "he is free to exercise this privilege at that point in time." *Id.* at 469.

Accordingly, the constitutional command that an individual be free from compelled self-incrimination and that any waiver of such right be voluntary necessitates, at a minimum, that the individual be warned at the outset of interrogation of his rights and that the individual be told that his decision to invoke those rights will be honored. See *id.* at 444 (there must be "fully effective means . . . devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *id.* at 478-79 ("[p]rocedural safeguards must be employed to protect the privilege [that are] fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored"); *id.* at 490 (requiring "safeguards for the privilege . . . as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it").

This minimum threshold requirement supplanted the "totality of the circumstances" analysis that the Court had used under the Fourteenth Amendment to determine whether the statements made during custodial interrogation were voluntary. See, *e.g.*, *Michigan* v. *Tucker*, 417

U.S. 433, 441 (1974) ("[b]efore *Miranda* the principal issue in these cases was not whether a defendant had waived his privilege against compulsory self-incrimination but simply whether his statement was 'voluntary.' In state cases the Court applied the Due Process Clause of the Fourteenth Amendment"); *id.* at 442 ("it was not until this Court's decision in *Miranda* that the privilege against compulsory self-incrimination *was seen as the principal protection for a person facing interrogation*") (emphasis added).

3. The "concrete constitutional guidelines" which the Court delineated encompass the third core constitutional holding in *Miranda*. The Court justified each of the warnings required in *Miranda* as "absolute prerequisite[s]," 384 U.S. at 468, to interrogation on the constitutional grounds that they were necessary and sufficient conditions to the intelligent exercise of the privilege in a custodial context. *First*, the Court held that a warning that the accused has the right to remain silent is indispensable "for an intelligent decision as to its exercise" as well as "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id. Second*, the Court held that "[t]he warning of the right to remain silent *must* be accompanied by the explanation that anything said can and will be used against the individual in court." *Id.* at 469 (emphasis added). The Court explained: "[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—*that he is not in the presence of persons acting solely in his interest.*" *Id.* (emphasis added).

Third, the Court recognized that the "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators," *id.*, and that "[e]ven

preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." *Id.* at 470. To remedy this, the Court held that "an individual held for interrogation *must* be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation," *id.* at 471 (emphasis added), and noted that " 'the right to be furnished counsel does not depend on a request.' ". See *id.* (quoting *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962)). The Court held that "[a]n individual need not make a pre-interrogation request for a lawyer" for the right to counsel to attach to custodial interrogation. *Id.* at 470. "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Id.* at 470-71.

Fourth, the Court required that a person interrogated be informed that "if he is indigent a lawyer will be appointed to represent him." *Id.* at 473. This step was held to be necessary to assure that the accused was in a position knowingly to exercise or waive this right: "As with the warnings of the *right* to remain silent and of the *general right* to counsel, only by effective and express explanation to the indigent of this right can there be assurance *that he was truly in a position to exercise it.*" *Id.* (emphases added).

Although *Miranda* invited Congress and the States to develop other "fully . . . effective" procedures to "safeguard[] . . . the privilege," *id.* at 490, the Court emphasized that "unless we are shown other procedures which are *at least as effective* in *apprising accused persons of their right of silence* and in assuring a continuous opportunity to exercise it," *id.* at 467 (emphasis added), the alternative procedures would fall short of the Fifth Amendment's requirements. *Miranda* did not leave Congress free to sup-

plant the requisite warnings with procedures that altogether fail to "appris[e] accused persons" at the outset of interrogation of their right to remain silent, their right to counsel, and assurance that exercise of these rights would be honored.

B. The Court's Subsequent Application Of *Miranda* To The States And On Habeas.

The Court's jurisprudence following *Miranda* further demonstrates that this Court in *Miranda* established constitutional, not merely supervisory, rules. In numerous subsequent opinions, the Court has referred to *Miranda*'s rules as constitutional requirements and extensions of its holding as constitutionally based. See *Edwards* v. *Arizona*, 451 U.S. 477, 481-82 (1981) (explaining that "[i]n *Miranda* v. *Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination *required* that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney") (emphasis added).[9]

Perhaps the clearest indication that the Court has never regarded *Miranda* as resting simply on its supervisory powers is the fact that the Court consistently has applied the *Miranda* rules to cases arising in state courts. See,

[9] *See also Illinois* v. *Perkins*, 496 U.S. 292, 296 (1990) (*Miranda* rules rest on "the Fifth Amendment privilege against self-incrimination"); *Butler* v. *McKellar*, 494 U.S. 407, 411 (1990) (noting holding of *Arizona* v. *Roberson* "that the Fifth Amendment bars police-initiated interrogations following a suspect's request for counsel in the context of a separate investigation"); *Michigan* v. *Jackson*, 475 U.S. 625, 629 (1986) ("[t]he Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations"); *Moran* v. *Burbine*, 475 U.S. 412, 427 (1986) (*Miranda* is "our interpretation of the Federal Constitution").

e.g., *Stansbury* v. *California*, 511 U.S. 318, 322-27 (1994); *Minnick* v. *Mississippi*, 498 U.S. 146, 152-53 (1990); *Arizona* v. *Roberson*, 486 U.S. 675, 680-82 (1988). (Indeed, three of the four consolidated cases which comprised *Miranda* arose in state courts.) Although the Court has the authority to announce rules of procedure and evidence binding on federal courts, fundamental principles of federalism preclude the exercise of any such supervisory authority over the state courts. With respect to cases tried before state tribunals, the Court's "authority is limited to enforcing the commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). The federal judiciary "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution." *Harris* v. *Rivera*, 454 U.S. 339, 344-45 (1981); see *McNabb* v. *United States*, 318 U.S. 332, 340 (1943) ("the power of this Court to undo convictions in state courts is limited to enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment") (citation omitted) (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)). Therefore, the Court's continued application of *Miranda*'s exclusionary rule in state cases is conclusive proof that *Miranda* rests on constitutional underpinnings.[10] The Fourth Circuit's effort cavalierly to dismiss this fact as "an interesting academic question . . . [that] has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution," J.A. 208 n.21, simply disregards the profound importance of this

[10] Indeed, *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), cases relied upon by the panel to support its conclusion that *Miranda* is not a constitutionally based decision, arose in state courts. In both decisions, the Supreme Court reaffirmed *Miranda*'s basic conclusion that unwarned statements must be excluded from the prosecution's case-in-chief. *Tucker*, 417 U.S. at 445; *Elstad*, 470 U.S. at 307.

limit on the Court's authority. In effect, the court of appeals is suggesting that this Court has exceeded its authority in scores of cases over the past 30 years. This is no matter of mere academic musings.

Finally, the Court has held that claims that a conviction rests on statements obtained in violation of *Miranda* are cognizable on federal habeas review. *Withrow* v. *Williams*, 507 U.S. 680, 690-95 (1993). Habeas review is only available for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). *Miranda* certainly does not involve laws or treaties. Thus, the Court's holding in *Withrow* depends on the conclusion that the requirements of *Miranda* arise from and protect constitutional rights. In reaching its conclusion, the Court rejected the government's argument that since the *Miranda* rules "are not constitutional in character, but merely 'prophylactic,'" federal habeas review should not extend to claims based on violations of these rules. *Withrow*, 507 U.S. at 690. The Court declined to reach this conclusion and observed that *Miranda* safeguards a "fundamental trial right." *Id.* at 691.

C. *Miranda*'s "Prophylactic" Rules Have Constitutional Weight.

The Fourth Circuit, citing no support, relies on the theory that "prophylactic" rules created by the Court to protect rights enumerated in the Constitution are subject to reversal by Congress and the States. See J.A. 203, 207. First, the Fourth Circuit's theory is clearly at odds with *Miranda*'s express holding that Congress and the States could not override its requirements. See, *e.g.*, *Miranda*, 384 U.S. at 490 (Congress and the States must adopt "safeguards for the privilege" that are "fully effective . . . in informing accused persons of their right of silence and in

affording a continuous opportunity to exercise it"). While the Court in subsequent opinions has referred to *Miranda*'s specific warnings as "prophylactic" rules that safeguard constitutional rights, that does not mean that *Miranda*'s holdings lack constitutional force and may be overridden by Congress. Those same opinions recognize the constitutional underpinnings of the rules and do not hold, or even suggest, that Congress and the States are free to reverse them. Moreover, the Court's many other opinions involving "prophylactic" rules that guard fundamental constitutional rights do not suggest that Congress and the States are free to override such rules.

Miranda's four warnings are flexible only in the sense that that they may be replaced by procedures "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467. They create a safe harbor when followed. But that does not mean the legislative branches are precluded from devising equally effective methods of protecting the privilege against self-incrimination. *Miranda* itself noted that one alternative procedure that would meet this requirement would be to require "[t]he presence of counsel" during interrogation. *Id.* at 466. Nonetheless, *Miranda* established a constitutional minimum to protect the right to silence and to counsel during custodial interrogation—*i.e.*, *Miranda*'s procedures or "other fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." *Id.* at 444; see *id.* at 467, 476, 478-79.

Indeed, the specific opinions the Fourth Circuit relied upon referring to the *Miranda* rules as "prophylactic" recognized the constitutional underpinnings of *Miranda*'s rules. In *Tucker*, 417 U.S. at 444, the Court held that the specific *Miranda* warnings were "not themselves *rights*

protected by the Constitution but were instead measures to *insure* that the right against compulsory self-incrimination was protected," *id.* (emphases added), and referred to *Miranda*'s own explanation that its prescribed warnings were not a " 'constitutional straightjacket.' " *Id.* (quoting *Miranda*, 384 U.S. at 467). Thus, *Tucker* is entirely consistent with *Miranda*'s understanding that the specific safeguards it prescribed were not required by the Constitution in the sense that other "procedures" or "solution[s]" could replace them so long as they were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467.

In *New York* v. *Quarles*, 467 U.S. 649, 654 (1983), the Court simply reiterated *Tucker*'s observation that the "Miranda warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' " *Id.* at 654 (alteration in original) (quoting *Michigan* v. *Tucker*, 417 U.S. 413, 444 (1974)). In *Elstad*, 470 U.S. at 318, the Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." In reaching this conclusion, the Court observed that *Miranda*'s exclusionary rule is prophylactic in that it "*serves* the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." *Id.* at 306 (emphasis added).[11] The Court nonetheless reaffirmed that a *Miranda* violation "affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." *Id.* at 306 n.1.

[11] The Court has also adopted constitutional prophylactic rules that predictably overprotect constitutional rights in a variety of other settings. *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974) (explaining that, even though "there is no constitutional value in false statements of fact," the Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny nevertheless "extended a measure of strategic protection to defamatory falsehood" in cases involving public officials and public figures); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (setting forth "procedural safeguards designed to obviate the dangers of a censorship system" with respect to motion picture obscenity).

Each of these cases does no more than adjust the contours of the prophylaxis. When, for example, public safety or good faith on the part of officials warrant limitations on the scope of the underlying constitutional provision, this Court (and not Congress or state legislatures) has carefully crafted adjustments.[12] The existence of such cases does not strip *Miranda*'s requirements of constitutional dimension. If it did, and if *Miranda*'s minimum threshold requirements represented nothing more than an exercise of the Court's supervisory powers, then there is no reason why such requirements should have been applicable to the States. It is fallacious to reason, as the Fourth Circuit has, that because this Court has made such adjustments to the prophylactic reach of *Miranda*, the Court was merely exercising a supervisory power rather than applying a constitutional requirement to a new type of circumstance.

Moreover, *Miranda* is just one of many instances in which the Court has announced prophylactic rules to protect underlying constitutional rights. For example, to "avoid[] otherwise difficult line-drawing problems" and

[12] *See, e.g., Tennessee* v. *Street*, 471 U.S. 409, 417 (1985) (confession that is inadmissible under *Bruton* rule is admissible for impeachment); *United States* v. *Leon*, 468 U.S. 897, 913 (1984) (officer's reasonable reliance on search warrant ultimately held invalid does not bar admission of evidence obtained in prosecution's case-in-chief); *Oregon* v. *Haas*, 420 U.S. 714, 721 (1975) (discussing why evidence obtained in violation of Fourth Amendment or *Miranda* is admissible for impeachment purposes).

adopt a test with "relatively few problems of proof," the Court has established a prophylactic rule that a permanent physical occupation is per se a taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982). The Court has created numerous additional "prophylatic constitutional rules," *Michigan* v. *Payne*, 412 U.S 47, 53 (1973), regarding criminal procedure. See *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969) (to protect Due Process Clause right to appeal, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear," or vindictiveness will be presumed); *Michigan* v. *Payne*, 412 U.S. at 53 (explaining that "[i]t is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce*, that their . . . application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation"); *Blackledge* v. *Perry*, 417 U.S. 21, 28-29 (1974) (although there was "no evidence that the prosecutor in this case acted in bad faith," it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right of appeal by bringing a more serious charge against him prior to the trial *de novo*); *Maine* v. *Moulton*, 474 U.S. 159, 168 (1985) (requiring suppression of accused's statements, relating to pending charges at trial, when obtained by law enforcement officials conducting surveillance of accused relating to new or additional crimes, despite assertions of the legitimate reasons for the surveillance, to protect the accused's Sixth Amendment right to communicate only through counsel with police regarding the pending charges); *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986) (holding that where "police initiate an interrogation after the defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's [Sixth Amendment] right to

counsel for that police-initiated interrogation is invalid" and resulting confessions inadmissible); *Michigan* v. *Harvey*, 494 U.S. 334, 345-46 (1990) (holding that a statement inadmissible in prosecution's case-in-chief under *Michigan* v. *Jackson*'s "prophylactic rule" may nonetheless be used "to impeach a defendant's false or inconsistent testimony"). Nothing in the language of those decisions suggests that their prophylactic character makes these rules not constitutionally required. Indeed, the fact that a rule is strongly prophylactic often reflects the importance of the underlying constitutional right and of preventing less than fully intelligent waiver of such a right. As the Court has explained, "we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Jackson*, 475 U.S. at 633 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

In sum, it cannot be that prophylactic rules designed to protect constitutional rights and applied against the States are not constitutionally required. "Prophylactic" is not a synonym for "non-constitutional." If it was, and Congress could alter *Miranda*'s rules, then for 33 years the Court has engaged in the rankest violation of federal-State relations and acted utterly lawlessly by requiring States to comply with *Miranda* rules that are not constitutionally required, and requiring compliance with a host of other prophylactic rules not required by the Constitution.

D. Section 3501 Is Constitutionally Infirm.

In enacting 18 U.S.C. § 3501, Congress attempted to secure the admissibility in federal courts of statements that would otherwise be suppressed under this Court's decision in *Miranda*.[13] By its terms, § 3501 makes "whether or

[13] *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. Congress also explicitly sought to overrule the now displaced holding of *Escobedo* v. *Illinois*, 378 U.S. 478, 490-91 (1964), which

not [a] defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him" simply one of many factors a trial judge may consider in determining whether a statement is "voluntary" and hence admissible. 18 U.S.C. § 3501(b)(3). Similarly, whether a defendant was advised of his right to counsel is but another factor to be considered. *Id.* § 3501(b)(4). The purpose and effect of § 3501 would be to establish the totality of the circumstances test for determining the admissibility of custodial statements, despite *Miranda*'s rejection of that test. Section 3501 therefore squarely conflicts with *Miranda*'s core holding that "the accused must be . . . apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467.

In addition, because § 3501 does not require the four specific warnings and additional procedures outlined in *Miranda*, nor does it provide procedures "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," *id.*, it fails to meet the minimum protections *Miranda* determined the Constitution required. Section

---

applied the Sixth Amendment right to counsel to interrogations conducted as part of a police investigation that had "focus[ed]" on a particular suspect in police custody. Although not raised in the Congressional debate (nor addressed in the Fourth Circuit's opinion below), § 3501 would also appear to render admissible statements obtained in violation of the holdings in *Massiah*, 377 U.S. at 206 (suppressing under the Sixth Amendment's right to counsel statements obtained through government efforts to "deliberately elicit[]" incriminating statements after adversarial proceedings have commenced) and *Wong Sun* v. *United States*, 371 U.S. 471, 484-87 (1963) (holding that even voluntary statements may be inadmissible if derived from an illegal arrest or search or otherwise the "fruit" of a Fourth Amendment violation). *See* Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?* 85 Cornell L. Rev. n.5 (forthcoming 2000).

3501's procedures are not "as effective" as those specified in *Miranda*. Section 3501 does not require "appropriate safeguards *at the outset* of the interrogation," *id.* at 457 (emphasis added), nor does it impose *any* affirmative obligation upon the part of officials to ensure that any statements are "truly the product of free choice." *Id.*

Similarly, § 3501's procedures, by failing to require that accused persons be informed of their right to silence and right to counsel, fail to require the knowing and intelligent waiver of these constitutional rights. *Miranda* specifically held that the "high standards of proof for the waiver of constitutional rights . . . applied to in-custody interrogation." *Id.* at 475 (citation omitted). The Court "ha[s] adhered to the principle that nothing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights." *Minnick*, 498 U.S. at 160 (Scalia, J., dissenting). Section 3501 conflicts with *Miranda*'s requirement that the government demonstrate knowing and intelligent waiver of the right to remain silent and to have assistance of counsel during custodial interrogation.

Congress has no power to overrule the Court's interpretations of the Constitution. *City of Boerne* v. *Flores*, 521 U.S. 507, 517-21 (1997). If that is the desired end, the proper course is to pursue the constitutional amendment process. Because § 3501 clearly conflicts with *Miranda*, and *Miranda* represents the Court's interpretation of the Constitution, § 3501 is invalid. If Congress could overturn any Supreme Court interpretation of the Constitution it disliked simply by enacting contrary legislation, then the Constitution would no longer be "superior, paramount law" but "on a level with ordinary legislative acts, and like other acts . . . alterable when the legislature shall please

to alter it." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II. THERE IS NO REASON TO DISLODGE *MIRANDA*'S CONSTITUTIONAL RULING.

Principles of *stare decisis* dictate that *Miranda* not be overruled now, 33 years after the decision. *Miranda* constituted a fully warranted exercise of the Court's power to interpret the Constitution which should not be disturbed. *Miranda* involved elucidation of a fundamental right that has become deeply ingrained in the Court's own subsequent opinions, in law enforcement practices, and in the public's understanding of the Constitution in a criminal justice setting.

The doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillary*, 474 U.S. 254, 265-66 (1986). Adhering to precedent " 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854 (1992). Although "the rule of *stare decisis* is not an 'inexorable command,' " *id.*, "[e]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.' " *United States* v. *International Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring)).

Traditional considerations in *stare decisis* analysis are whether the "governing decisions are unworkable," *Payne* v. *Tennessee*, 501 U.S. at 827, whether the governing decisions are subject to a kind of reliance that would lead to special hardship were those decisions abandoned, see *id.* at 827-28; *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Casey*, 505 U.S. at 854-56, whether the law's development in intervening years has rendered the prior holding a "remnant of abandoned doctrine," *Casey*, 505 U.S. at 855; see *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-74 (1989); whether any factual premises underlying the prior holding have so changed as to render the holding irrelevant or unjustifiable, see *Casey*, 505 U.S. at 855; *Vasquez*, 474 U.S. at 266; and whether the governing decision was "unsound in principle." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). Each of these considerations is addressed below. Each demonstrates that *Miranda* should be reaffirmed.

A. Workability.

Miranda's holdings have in no sense proven "unworkable" in practice.[14] To the contrary, *Miranda's* core holding that there must be procedures to apprise an individual in custody of his rights and its specific rules have proven easy to administer by law enforcement officers and the courts. The United States has represented that "[f]ederal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to an-

---

[14] *Cf. Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (finding determination of whether particular governmental function is " 'integral' " or " 'traditional' " to be "unsound in principle and unworkable in practice").

answer questions." Gov't Pet. Br. 21. This Court has repeatedly held that a virtue of *Miranda* is the ease and clarity of its application by police and courts. See *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986) ("[a]s we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application") (second alteration in original); *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984) (noting "the simplicity and clarity" of *Miranda*); see also *New York* v. *Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in and dissenting in part) (*Miranda* rules have " 'afforded police and courts clear guidance on the manner in which to conduct a custodial investigation.' "). Even 19 years ago, Chief Justice Burger declared: "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, [nor] disparage it . . . at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

Although the Court has noted that *Miranda*'s requirements may have led in some instances to the exclusion of statements that were not the product of physical or psychological coercion,[15] application of *Miranda* has not been shown to undermine law enforcement. Indeed, it is just as likely that the simplicity and lack of ambiguity in a *Miranda* waiver form have resulted in the admission of statements that might otherwise have been found to be compelled. At bottom, the "judgment and experience of federal law enforcement agencies is that *Miranda* is workable in practice and serves several significant law enforcement objectives." Gov't Pet. Br. 20. The minimum burdens *Miranda* imposes are in fact likely outweighed by the decision's benefits. See *Fare* v. *Michael C.*, 442 U.S. 707,

[15] *See, e.g., Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990) (*Miranda*'s exclusionary rule "result[s] in the exclusion of some voluntary and reliable statements").

718 (1979) (noting that the "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts"). The benefit to the administration of justice is reflected in the fact that some federal agencies have expanded use of *Miranda* warnings to non-custodial settings. See Gov't Pet. Br. 21-22.

The ease with which *Miranda* is applied by courts contrasts markedly with the difficulties that courts experienced attempting to apply the former Due Process Clause totality of the circumstances test for voluntariness, as even the dissent in *Miranda* reveals. See *Miranda* v. *Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (describing that in "more than 30 full opinions" "the voluntariness rubric was . . . never pinned down to a single meaning but on the contrary [the Court] infused it with a number of different values. . . . The outcome was a continuing re-evaluation on the facts of each case of *how much* pressure on the subject was permissible") (citation omitted).

B. Reliance.

While the Court has held that the "classic case for weighing reliance heavily in favor of following [an] earlier rule occurs in the commercial context," *Casey*, 505 U.S. at 855-56 (citing *Payne* v. *Tennessee*, 501 U.S. at 828), the Court has also consideerd whether reversal of a precedent would result in "significant damage to the stability of the society governed by it." *Id.* at 855. For nearly thirty-five years, *Miranda*'s requirements have shaped law enforcement training, police conduct, the provision of counsel to those subjected to custodial interrogation and public expectations with respect to custodial interrogation. The *Miranda* warnings themselves have been widely popularized, and for good reason: they promote a percep-

tion of fairness, integrity and respect for the Constitution in the criminal justice system. See Gov't Pet. Br. 36.

C. Subsequent Doctrinal Developments.

It cannot be said that "intervening development of the law, through . . . the growth of judicial doctrine," has removed *Miranda*'s doctrinal underpinnings. *Patterson*, 491 U.S. at 173. Just the opposite is true. The Court has consistently premised subsequent decisions on the continuing validity of *Miranda*'s core holding requiring the suppression of unwarned statements in the prosecution's case-in-chief. See, *e.g.*, *Minnick* v. *Mississippi*, 498 U.S. 146, 156 (1990) (suppressing statement given after defendant had requested and consulted with counsel, but while counsel was not present); *Pennsylvania* v. *Muniz*, 496 U.S. 582, 599 (1990) (suppressing unwarned response to question asked during station house sobriety test); *Berkemer*, 468 U.S. at 434 (holding unanimously that *Miranda* applies to questioning on misdemeanor charges).

In fact, the Court has expanded and clarified *Miranda*'s requirements with respect to the exclusion of unwarned statements in the prosecution's case-in-chief. For example, *Miranda* held that the police must terminate interrogation of an accused in custody if the accused requests assistance of counsel. 384 U.S. at 474. The Court reinforced the protections of *Miranda* in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which held that once the accused requests counsel, officials may not reinitiate questioning "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police." *Id.* at 484-85. *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990). In *Minnick*, the Court reinforced *Edwards*, holding that "when counsel is

requested, interrogation must cease, and officials may not reinitiate interrogation *without counsel present, whether or not the accused has consulted with his attorney*." 498 U.S. at 153 (emphasis added). The Court stated that its holding in *Minnick* was consistent with *Miranda*'s observation that "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.* at 154 (quoting *Miranda*, 384 U.S. at 470).

The Court's subsequent opinions have never suggested that Congress or the States could ignore *Miranda*'s core holdings and adopt procedures, such as those embodied in § 3501, that fail to require apprising accused persons of their Fifth Amendment rights. To the contrary, the Court has repeatedly imposed a heightened standard for waiver during custodial interrogation of the right to remain silent and the right to counsel. "The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, [the Court] ha[s] held, that it 'requir[es] the special protection of the knowing and intelligent waiver standard.' " *Davis* v. *United States*, 512 U.S. 452, 458 (1994) (third alteration in original) (quoting *Edwards* v. *Arizona*, 451 U.S. 477, 483 (1981)).

The Court has, under certain circumstances, continued to examine the application of *Miranda*'s exclusionary requirements to situations not considered in *Miranda*. The Court has also declined to extend *Miranda*'s exclusionary requirements to situations or types of evidence not considered in *Miranda*. See, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. 433, 449 (1974) (declining to extend exclusionary rule to testimony of witness discovered as a result of accused's statements); *Oregon* v. *Elstad*, 470 U.S. 298, 314-17 (1985) (declining to suppress statement made after

warnings and valid waiver of rights where police had obtained earlier voluntary but unwarned statement); *Quarles*, 467 U.S. at 659-60 (refusing to suppress weapon found as a result of unwarned statements based on public safety exception to *Miranda*). The Court's carefully justified decisions not to extend *Miranda* in certain contexts in no way suggest that *Miranda*'s holdings are a "doctrinal anachronism." *Casey*, 505 U.S. at 855.

D. Unchanged Factual Premises.

In the intervening years since *Miranda*, the characteristics and circumstances of police interrogations have not changed in a manner that robs *Miranda*'s rule "of significant application or justification." *Casey*, 505 U.S. at 855. A cursory review of reported decisions demonstrates the point. See, *e.g.*, *Cooper* v. *Dupnik*, 963 F.2d 1220, 1224 (9th Cir. 1992) (*en banc*) (according to prearranged plan, officers ignored subject's requests for counsel and interrogated him for four hours in hopes of obtaining a confession which they knew would be inadmissible, but could be used for impeachment); *Weaver* v. *Brenner*, 40 F.3d 527, 537 (2d Cir. 1994) (officers who had probable cause for arrest nonetheless conducted allegedly coercive interrogation in order to obtain confession). Even if, overall, instances of "brutality" and physical coercion may have declined since 1966, any such decline is likely the result of adoption of *Miranda*'s rule requiring "procedures . . . effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," 384 U.S. at 467, thus fulfilling the Court's hope, if not prophecy, that the "proper limitation upon custodial interrogation" set forth in *Miranda* would "eradicate[]" physical coercion "in the foreseeable future." *Id.* at 447.

Moreover, it cannot be said that the psychological coercion that *Miranda* found inherent in interrogations of

citizens no longer exists. Custodial interrogations are still largely conducted in private, with accused citizens cut off from relatives, friends and attorneys. Individuals are still "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Id.* at 457. This Court's own cases reflect this fact. See, *e.g.*, *Minnick*, 498 U.S. at 153-54 ("The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. . . . [T]hough [petitioner] resisted, he was required to submit to both the FBI and the [Sheriff] Denham interviews."). Put simply, the nature of the interrogation process has not changed so markedly since issuance of *Miranda* as to rob the Court's decision of significant application and justification.

Even were it found that *Miranda* has been so successful that most persons subjected to interrogation are aware of their right to remain silent, the *Miranda* warnings retain their importance. The warnings "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S. at 468. Further, *Miranda*'s procedures are necessary to ensure that an accused's attempt to exercise his rights is "fully honored." *Id.* at 467.

E. *Miranda* Is Not "Unsound In Principle."

Miranda's holdings are certainly neither unreasoned nor "unsound in principle." *Garcia*, 469 U.S. at 546-47. To the contrary, the decision was a proper act of constitutional interpretation.[16] First, *Miranda*'s minimum threshold requirements are consistent with the text and history of the Fifth Amendment. Second, they flow logically from, and closely match, the scope of the underlying Fifth

[16] While the method and result of the constitutional analysis were routine, *Miranda* was remarkable in that the Court interpreted a "fundamental" right at the core of our democratic system.

Amendment right. Third, these requirements were a natural outgrowth of judicial precedent and law enforcement experience. And fourth, having proven to be far easier to administer in courts, and by law enforcement, *Miranda*'s minimum requirements more effectively serve the purposes of the Fifth Amendment than the totality-of-the circumstances test.

First, *Miranda*'s minimum threshold requirements are consistent with the text of the Fifth Amendment, which states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V (App. 1a). While expressed as a limitation on government power, the Fifth Amendment's prohibition against government efforts to coerce an individual to make incriminating statements necessarily means that the individual has an affirmative right to remain silent, and any waiver must be knowing, intelligent, and voluntary. See *Miranda*, 384 U.S. at 465. *Miranda*'s requirements simply assure that individuals can freely choose to exercise the right to remain silent.

The history of the Fifth Amendment also supports *Miranda*'s minimum threshold requirements. As the Court has noted, the Framers likely understood the Fifth Amendment to reflect common law rights. See *United States* v. *Balsys*, 118 S. Ct. 2218, 2232 & nn.13, 14 (1998). The Framers certainly understood that the common-law and Constitutional rights against self-incrimination not only were part of a complex of other trial rights, but also were *evolving* rights that changed as criminal procedures developed.[17] The *Miranda* Court's crafting of the minimum

[17] *See* Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination* 109, 136-41 (R.H. Helmholz et al. eds., 1997) ("*The Privilege*"); Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins, in The Privilege* 145, 148-59;

threshold requirements in light of contemporary practices in the criminal justice system is fully consistent with this tradition. In addition, the core aspects of *Miranda*'s requirements echo views at the time of the framing. For example, it was understood that the privilege against self-incrimination, among other things, entitled a defendant to remain silent, rather than answer questions under oath posed by a government interrogator before trial.[18] And by the mid-nineteenth century, interrogators in both America and England advised defendants of their right to remain silent.[19] In that manner, too, *Miranda*'s requirements are consistent with the historical understanding of the right.[20] And more fundamentally, throughout its his-

United States v. *Balsys*, 118 S. Ct. 2218, 2223 (1998); *cf. Miranda*, 384 U.S. at 460; *id.* at 507-08 (Harlan, J., dissenting).

[18] *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective, in The Privilege* 181, 192.

[19] *See* Alschuler, *supra* at 198.

[20] The historical record is admittedly less clear as to the extent to which, at the time of the framing, interrogators could require defendants to make *unsworn* pretrial statements. Although the Marian committal statute of 1555 directed magistrates to interrogate suspects, and this practice was carried over into the manuals distributed to justices of the peace in Colonial America (*see* John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in The Privilege* 82, 91-94; Moglen, *supra* at 116-17), there is evidence that commentators and a number of practitioners concluded that the right to remain silent applied to unsworn pre-trial statements as well. Moglen, *supra* at 141-43; Langbein, *supra* at 97. Moreover, it would be inappropriate to read the Fifth Amendment right as merely prohibiting the specific practices that were prohibited by statute or the common law at the time of its adoption. First, such a venture is risky, because the historical record is spare and the Framers' understanding of the precise scope of the right is unclear. R.H. Helmholz, *Introduction, in The Privilege* 1, 11; Moglen, *supra* at 136-38. Second, as noted in the text, the right against self-incrimination was part of a cluster of other trial rights and was itself an evolving right that changed as criminal procedures

tory, the principle against self-incrimination has stood as an expanding bulwark to protect the private interests enunciated by *Miranda*, including guarding individual conscience against government intrusion.[21]

Second, *Miranda*'s minimum threshold requirements closely adhere to the scope of the underlying Fifth Amendment right. While phrasing the principle in somewhat different ways, the Court has repeatedly held for over a century, both before and after *Miranda*, that the "Fifth Amendment guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). Thus, the prohibition against "compelled" statements means that the statement must be "truly the product of free choice." *Miranda*, 384 U.S. at 457, 458.[22] That is, the

---

changed. Third, to return to the practices at the time just before the Framing would be to revert to a world in which defendants were prohibited from testifying under oath on their own behalf, Langbein, *supra* at 88; Alschuler, *supra* at 198, which would require overruling *Rock* v. *Arkansas*, 483 U.S. 44 (1987); where, because counsel was generally unavailable as a matter of right or practice, defendants were effectively *required* to speak as unsworn advocates on their own behalf (which of course rendered any right against self-incrimination largely meaningless), Langbein, *supra* at 82-88; Alschuler, *supra* at 194-95, which would require overruling not only countless Fifth Amendment cases, but also *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); and where the trier of fact could make unfavorable inferences from the defendants' failure to speak, Langbein, *supra* at 92, which would require overruling *Griffin* v. *California*, 380 U.S. 609 (1965).

21 *See, e.g.*, R.H. Helmholz, *The Privilege and the Jus Commune: The Middle Ages to the Seventeenth Century, in The Privilege* 17, 21-29, 44; Charles M. Gray, *Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries, in The Privilege* 47, 61-63; Langbein, *supra* at 103, 108.

22 *See Withrow* v. *Williams*, 507 U.S. 680, 689 (1993); *Doe* v. *United States*, 487 U.S. 201, 214 n.12 (1988); *Carter* v. *Kentucky*,

individual must make a knowing, intelligent, and voluntary choice not to remain silent. See, *e.g.*, *id.* at 465. Given this scope of the underlying right, as well as the nature of custodial interrogation, it only makes sense that the individual be reminded of his right to remain silent and that other safeguards be put in place to assure that the individual's right is observed. See *id.* at 469-75.

Third, *Miranda*'s holding was the natural outgrowth of more than 30 years of judicial experience with the totality-of-the-circumstances test. On the one hand, it *continued* the natural advancement in the Court's understanding of the nature of compulsion, which, as the principal dissent in *Miranda* noted, had evolved to require "close attention to the individual's state of mind and capacity for effective choice." *Id.* at 507 (Harlan, J., dissenting); see also, *e.g.*, *Colorado* v. *Connelly*, 479 U.S. 157, 164 (1986) (Rehnquist, C.J.); *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960). It also was faithful to the Court's longstanding admonition that the Fifth Amendment right be generously interpreted. See *Miranda*, 384 U.S. at 461 (citing cases);

---

450 U.S. 288, 304 (1981); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will' than Mincey's."); *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968) ("Considering the totality of these circumstances, we do not think it credible that petitioner's statements were the product of his free and rational choice."); *Culombe* v. *Connecticut*, 367 U.S. 568, 583 (1961) ("[A]n extra-judicial confession, if it was to be offered in evidence against a man, must be the product of his own free choice."); *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958) ("It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice.'") (footnotes omitted); *Lisenba* v. *California*, 314 U.S. 219, 241 (1941) (no evidence that statements "were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer"); *Bram* v. *United States*, 168 U.S. 532, 549 (1897) ("accused must be free of hope or fear in respect to the crime charged").

id. at 508 (Harlan, J., dissenting) (noting that the trend in the Court's decisions was "usually in the direction of restricting admissibility").

On the other hand, based upon 30 years of judicial experience, the *Miranda* Court *rejected* the totality of the circumstances test for measuring compulsion under the Fifth Amendment. In over 30 cases in as many years, the Court's analysis constantly changed, see *id.* at 507-08 (Harlan, J., dissenting), and the Court recognized that, given the proper focus on the mental state and capacity of the accused, continuing to engage in a totality-of-the circumstances analysis would involve pure "speculation." *Id.* at 468-69. Yet, this was not all. Even if the speculative exercise could be undertaken, *Miranda* also held that it was necessary for officials to inform even a suspect aware of his rights that his interrogators—these particular interrogators—themselves understood and would respect his rights. *Id.* This further requirement also flows from the need to ensure an unfettered choice. At bottom, the inquiry necessary under a "totality of the circumstances" test, in order to ensure a knowing and voluntary waiver, would look no further than the "ascertainable fact" of whether the accused had been apprised of his rights. Thus, the Court quite properly recognized that *Miranda*'s minimum requirements were the only appropriate response.

Similarly, *Miranda*'s minimum threshold requirements were based on the Court's understanding of the extensive practical experience of law enforcement. On the one hand, the core requirement of apprising the accused of his rights and safeguarding exercise of those rights, as well as the specific warnings, were based on similar rules in place for federal enforcement personnel. See *id.* at 481-86. On the other hand, the imposition of the requirements as a matter of constitutional law reflected the

Court's own institutional experience in analyzing the nature of police interrogations, *id.* at 448, 456, as well as its understanding of the difficulty of reconstructing what actually occurs during interrogations, see *id.* at 448. Moreover, the *Miranda* Court was mindful to minimize the burden imposed on law enforcement—all it required were warnings and attendant procedural safeguards, with which law enforcement could easily comply. It further provided the political branches of both the States and federal government with flexibility to adopt alternative procedures, as long as they complied with the constitutional requirements that the accused be informed of his or her rights through the use of procedures as fully as effective as those announced by the Court.

Finally, over 30 years of additional experience since *Miranda* have proven that *Miranda*'s minimum requirements better serve the policies underlying the Fifth Amendment. While the Fifth Amendment serves a number of purposes, at bottom, it serves to protect "the dignity and integrity of its citizens," by striking a "'fair state-individual balance.'" *Id.* at 460 (quoting 8 Wigmore, *Evidence* 317 (McNaughton rev. 1961); see *Balsys*, 118 S. Ct. at 2232 (balancing private and governmental interests in determining the scope of the Fifth Amendment right). *Miranda*'s requirements strike a fairer balance than the totality-of-the-circumstances test. These minimum requirements better serve law enforcement by providing a clear-cut rule for interrogating witnesses, rather than subjecting police to second guessing based on a more amorphous totality-of-the-circumstances test. They better serve the judiciary by providing a test that is more easily and consistently administered, rather than reconstructing all of the circumstances of an interrogation and attempting to divine the defendant's state of mind. They better serve the individual by helping to assure that the indi-

vidual is aware of his rights and that those rights are respected. And adherence comes at little cost—it only requires that the warnings be administered, something that is an extraordinarily simple act.

F. Considerations That Transcend Traditional Factors.

Miranda has become one of the Court's most famous opinions of the twentieth century. Where the rules of cases have found " 'wide acceptance in the legal culture,' " this "is adequate reason not to overrule these cases." *Mitchell* v. *United States*, 119 S. Ct. 1307, 1316 (1999), (Scalia, J., dissenting). *Miranda*'s widespread acceptance, however, extends far beyond the legal culture. *Miranda*'s specific holding has become widely popularized through television and film and hence is emblazoned on the public's consciousness. Whatever concerns arose immediately in the aftermath of *Miranda* as to guilty defendants being released on a technicality have been replaced by an abiding respect for *Miranda* rights. The public correctly understands that the Court held in *Miranda* that to protect an individual's constitutional right to remain silent, law enforcement officers must inform suspects subjected to interrogation of their right to remain silent, that what they say can and will be used against them, that they have a right to an attorney, and if they cannot afford one, an attorney will be appointed for them, and that law enforcement officers must honor a suspect's request to remain silent or to have counsel.

Adherence to *Miranda*'s requirements has promoted public confidence that law enforcement officers and the courts are treating individuals subjected to custodial interrogation in a similar, fair and lawful manner that respects their constitutional right to remain silent. Overruling *Miranda* would thus erode public confidence that police and the courts are treating persons subjected to custodial interro-

gation in a manner that appropriately and fairly respects their constitutional rights. As the United States notes, law enforcement depends on citizen cooperation and support, and a step such as overruling *Miranda*, which could undermine that support, should not be taken lightly. See Gov't Pet. Br. 36.

Moreover, departing from *Miranda* would erode public confidence in the legitimacy of the Court's elucidation of constitutional principles. "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Casey*, 505 U.S. at 865. Because neither the factual underpinnings of *Miranda*'s central holding nor subsequent evolution in the Court's jurisprudence justify abandoning *Miranda*, "the Court could not pretend to be reexamining [*Miranda*] with any justification beyond a present doctrinal disposition to come out differently." *Id.* at 864. A substantial reduction in the protections afforded by *Miranda* would, under these circumstances, needlessly upset "a carefully crafted balance designed to fully protect both the defendant's and society's interests." *Moran* v. *Burbine*, 475 U.S. 412, 433 n.4 (1986).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES W. HUNDLEY *
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

PAUL F. WASHINGTON
75 Rockefeller Plaza
New York, New York 10019
(212) 484-6753

Counsel for Petitioner

January 28, 2000

* Counsel of Record

APPENDIX

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

18 U.S.C. § 3501 Admissibility of Confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the

defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence of absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention. *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance

to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Jan 28 2000

Supreme Court, U.S.
FILED
FEB 28 2000
JAN
CLERK

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

JANET RENO
Attorney General

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
LISA S. BLATT
Assistants to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

60+P

QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. 3501, notwithstanding that the confession was taken in violation of the requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

TABLE OF CONTENTS

	Page
Statement	1
Introduction and summary of argument	6
Argument:	
I. Section 3501 could be validly applied to require the admission in evidence of confessions that would be inadmissible under *Miranda* and its progeny only if this Court were to overrule its decisions in *Miranda* and the cases that have followed it	11
A. Section 3501 was intended to and does return to the pre-*Miranda* voluntariness test	11
B. This Court's decisions in *Miranda* and the cases that have followed it reveal that the *Miranda* rule is based on this Court's authority to interpret and apply the Constitution	21
C. Congress may not overrule this Court's decision in *Miranda*, because that decision is based on the Constitution and Congress may not overrule constitutional decisions of this Court	26
II. *Miranda* should not be overruled	29
A. Costs and workability	31
B. Reliance interests	38
C. Developments in the law that have affected the validity of the past precedent	39
D. Change in factual premises	47
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Agostini v. *Felton*, 521 U.S. 203 (1997) 6
Anders v. *California*, 386 U.S. 738 (1967) 44
Arizona v. *Evans*, 514 U.S. 1 (1995) 36
Arizona v. *Roberson*, 486 U.S. 675 (1988) 23, 34, 35, 39
Ashcraft v. *Tennessee*, 322 U.S. 143 (1944) 15
Ashdown v. *Utah*, 357 U.S. 426 (1958) 16
Ashwander v. *TVA*, 297 U.S. 288 (1936) 6
Bell v. *Burson*, 402 U.S. 535 (1971) 28
Berkemer v. *McCarty*, 468 U.S. 420 (1984) 34, 35, 36, 39
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) 28
Blackburn v. *Alabama*, 361 U.S. 199 (1960) 41
Blackledge v. *Perry*, 417 U.S. 21 (1974) 46
Brown v. *Allen*, 344 U.S. 443 (1953) 16
Brown v. *Mississippi*, 297 U.S. 278 (1936) 11, 15
Bruton v. *United States*, 391 U.S. 123 (1968) 45
Butler v. *McKellar*, 494 U.S. 407 (1990) 25
California Attorneys for Criminal Justice v. *Butts*, 195 F.3d 1039 (9th Cir. 1999) 38
Chambers v. *Florida*, 309 U.S. 227 (1940) 17
Cicenia v. *Lagay*, 357 U.S. 504 (1958) 16, 24
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 6, 11, 29
Colorado v. *Connelly*, 479 U.S. 157 (1986) 31
Colorado v. *Spring*, 479 U.S. 564 (1987) 18, 34, 37
Colten v. *Kentucky*, 407 U.S. 104 (1972) 46
Connecticut v. *Barrett*, 479 U.S. 523 (1987) 22
Crooker v. *California*, 357 U.S. 433 (1958) 16
Culombe v. *Connecticut*, 367 U.S. 568 (1961) 16, 37
Davis v. *United States*, 512 U.S. 452 (1994) 22, 35
Douglas v. *California*, 372 U.S. 353 (1963) 44
Doyle v. *Ohio*, 426 U.S. 610 (1976) 38
Duckworth v. *Eagan*, 492 U.S. 195 (1989) 22
Edwards v. *Arizona*, 451 U.S. 477 (1981) 23, 25, 35, 39

Cases—Continued: Page

Estelle v. *Smith*, 451 U.S. 454 (1981) 39
Fare v. *Michael C.*, 442 U.S. 707 (1979) 34
Fikes v. *Alabama*, 352 U.S. 191 (1957) 17
Freedman v. *Maryland*, 380 U.S. 51 (1965) 46
Gallegos v. *Colorado*, 370 U.S. 49 (1962) 14, 15
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 46
Gray v. *Maryland*, 523 U.S. 185 (1998) 45
Haley v. *Ohio*, 332 U.S. 596 (1948) 16, 17, 41
Harris v. *New York*, 401 U.S. 222 (1971) 23
Harris v. *Rivera*, 454 U.S. 339 (1981) 24
Harris v. *South Carolina*, 338 U.S. 68 (1949) 16, 17
Haynes v. *Washington*, 373 U.S. 503 (1963) 14, 15, 16, 41
Illinois v. *Gates*, 462 U.S. 213 (1983) 32
Illinois v. *Perkins*, 496 U.S. 292 (1990) 24
Johnson v. *United States*, 333 U.S. 10 (1948) 37
Kastigar v. *United States*, 406 U.S. 441 (1972) 40
Lego v. *Twomey*, 404 U.S. 477 (1972) 44
Leyra v. *Denno*, 347 U.S. 556 (1954) 16
Lisenba v. *California*, 314 U.S. 219 (1941) 16
Malinski v. *New York*, 324 U.S. 401 (1945) 14, 16
Mallory v. *United States*, 354 U.S. 449 (1957) 18
Malloy v. *Hogan*, 378 U.S. 1 (1964) 12
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 6, 29
Massiah v. *United States*, 377 U.S. 201 (1964) 13
Mathis v. *United States*, 391 U.S. 1 (1968) 39
McNabb v. *United States*, 318 U.S. 332 (1943) 18
McNeil v. *Wisconsin*, 501 U.S. 171 (1991) 31
Michigan v. *Harvey*, 494 U.S. 344 (1990) 31, 45
Michigan v. *Jackson*, 475 U.S. 625 (1986) 25, 44
Michigan v. *Payne*, 412 U.S. 47 (1973) 46
Michigan v. *Tucker*, 417 U.S. 433 (1974) 12, 22
Miller v. *Fenton*, 474 U.S. 104 (1985) 36, 37
Minnick v. *Mississippi*, 498 U.S. 146 (1990) 23, 35, 38, 39, 43
Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... *passim*
Moran v. *Burbine*, 475 U.S. 412 (1986) 7, 25, 34, 41, 42

Cases—Continued: Page

Mu'Min v. *Virginia*, 500 U.S. 415 (1991) 24
New Jersey v. *Portash*, 440 U.S. 450 (1979) 40
New York v. *Quarles*, 467 U.S. 649 (1984) 23, 34, 35, 39
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 46
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 45
Oregon v. *Elstad*, 470 U.S. 298 (1985) 22, 23, 31, 36-37, 39, 43, 44
Oregon v. *Hass*, 420 U.S. 714 (1975) 23
Orozco v. *Texas*, 394 U.S. 324 (1969) 39
Payne v. *Arkansas*, 356 U.S. 560 (1958) 16
Payne v. *Tennessee*, 501 U.S. 808 (1991) 31, 38
Pennsylvania v. *Finley*, 481 U.S. 551 (1987) 44
Pennsylvania v. *Muniz*, 496 U.S. 582 (1990) 39
Pennsylvania Bd. of Probation & Parole v. *Scott*, 524 U.S. 357 (1998) 32
Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U.S. 833 (1992) 30, 31
Reck v. *Pate*, 367 U.S. 433 (1961) 14, 17
Rhode Island v. *Innis*, 446 U.S. 291 (1980) 30
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 11, 12, 14, 37
Smith v. *Illinois*, 469 U.S. 91 (1984) 39
Smith v. *Phillips*, 455 U.S. 209 (1982) 24
Smith v. *Robbins*, No. 98-1037 (Jan. 19, 2000) 44
Spano v. *New York*, 360 U.S. 315 (1959) 15, 41
Stansbury v. *California*, 511 U.S. 318 (1994) 23
Stein v. *New York*, 346 U.S. 156 (1953) 15, 17
Tennesse v. *Street*, 471 U.S. 409 (1985) 45
Thomas v. *Arizona*, 356 U.S. 390 (1958) 17
Thompson v. *Keohane*, 516 U.S. 99 (1995) 24, 36, 39
Turner v. *Pennsylvania*, 338 U.S. 62 (1949) 16, 17
United States v. *Goodwin*, 457 U.S. 368 (1982) 46
United States v. *Green*:
504 U.S. 908 (1992) 35
507 U.S. 545 (1993) 35

Cases—Continued: Page

United States v. *International Bus. Mach. Corp.*, 517 U.S. 843 (1996) 30
United States v. *Leon*, 468 U.S. 897 (1984) 32, 36
United States v. *Morrison*, 449 U.S. 361 (1981) 47
United Statse v. *Wade*, 388 U.S. 218 (1967) 18
Vasquez v. *Hillary*, 474 U.S. 254 (1986) 30, 31
Wasman v. *United States*, 468 U.S. 559 (1984) 46
Watts v. *Indiana*, 338 U.S. 49 (1949) 17
Westover v. *United States*, 383 U.S. 903 (1966) 48
Withrow v. *Williams*, 507 U.S. 680 (1993) 24, 34, 37, 39
Wong Sun v. *United States*, 371 U.S. 471 (1963) 13

Constitution and statutes:

U.S. Const.:
Amend. IV 13, 32
Amend. V (Self Incrimination Clause) ..... *passim*
Amend. VI (Confrontation Clause) 44, 45
Amend. XIV (Due Process Clause) 7, 11, 12
18 U.S.C. 241 (1994 & Supp. III 1997) 28
18 U.S.C. 242 (1994 & Supp. III 1997) 28
18 U.S.C. 371 2
18 U.S.C. 924(c) 2
18 U.S.C. 2113(a) 2
18 U.S.C. 2113(d) 2
18 U.S.C. 3501 ..... *passim*
18 U.S.C. 3501(a) 3, 7, 11, 13, 14
18 U.S.C. 3501(b) 4, 7, 11, 13, 14, 15, 17
18 U.S.C. 3501(c) 18
18 U.S.C. 3502 18
28 U.S.C. 2254(a) 24

Miscellaneous:

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998) 32

Miscellaneous—Continued:	Page
113 Cong. Rec. 1583 (1967):	
p. 1583	18
p. 1584	18
114 Cong. Rec. (1968):	
p. 11,189	19
p. 11,206	20
p. 11,594	20
p. 11, 612	20
p. 13,202	20
p. 14,136	20
p. 14,158	20
p. 14,167	20
p. 14,176	20
p. 16,066	20
p. 16,075	20
p. 16,296	20
Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Crim. Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967)	19
John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147 (1998)	32
Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975)	28
Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397 (1999)	32
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968)	19, 20
Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. Rev. 500 (1996)	32
1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* (3d ed. 1999)	29

STATEMENT

1. On January 24, 1997, the First Virginia Bank in Alexandria, Virginia, was robbed of approximately $876. The robber carried a silver semi-automatic handgun and a black leather bag. Immediately after the robbery, a witness saw the robber place something into the trunk of a white Oldsmobile Ciera, get into the passenger side of the car, and ride away. The witness observed the getaway car's license plate number, and law enforcement agents determined that the car was registered to petitioner. J.A. 36-37, 140-141, 167.

On January 27, 1997, at around 5:30 p.m., a team including agents of the Federal Bureau of Investigation (FBI) and an Alexandria police detective went to petitioner's apartment in Takoma Park, Maryland. Several agents entered the apartment.[1] While the agents were there, FBI Special Agent Lawlor saw a large amount of cash (later determined to be $552) on petitioner's bed. Petitioner refused to allow the agents to search his apartment. Petitioner then accompanied the agents to the FBI field office in Washington, D.C. J.A. 37, 141-142, 167-168.

Agent Lawlor and Alexandria Detective Durkin interviewed petitioner at the FBI field office. Agent Lawlor testified that petitioner initially stated only that he had driven his white Oldsmobile Ciera to the Old Town area of Alexandria at about 10 a.m. to look at a restaurant. Petitioner also said that he parked his car and went to get a bagel. Agent Lawlor testified that the area in which petitioner was parked was near the scene of the bank robbery. J.A. 43, 168. Agent Lawlor testified that he then left the room and obtained by telephone a warrant to search

---

[1] At the suppression hearing, the testimony of Special Agent Christopher Lawlor and that of petitioner diverged on several issues. See J.A. 141. For example, Agent Lawlor testified that the entry was by consent after he knocked on the door, *ibid.*, while petitioner testified that the agents entered without being invited in, *id.* at 142.

petitioner's apartment. *Id.* at 43, 168-169. Lawlor testified that he returned to the interview room and told petitioner that other agents were about to search his apartment. Lawlor further testified that petitioner was then advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and waived those rights in writing. J.A. 44-46, 170.

According to Lawlor, after the waiver, petitioner admitted that he had been with Jimmy Rochester on the morning of the robbery, and that Rochester had previously committed numerous robberies and might have robbed the First Virginia Bank. Petitioner stated that both he and Rochester left petitioner's car to go separate places, and that when he returned, Rochester was already in the car and the two drove away. He also stated that he stopped the car at Rochester's request, and Rochester put something in the trunk. Later, Rochester told him to run a red light, and petitioner began to surmise that Rochester might have robbed a bank. Petitioner also said that later that day Rochester gave him a silver .45-caliber pistol, and that the agents might find the gun and dye-stained money in petitioner's apartment. J.A. 46-47, 170. Officers subsequently searched petitioner's apartment and found a .45-caliber handgun, dye-stained money and a bait bill from another robbery or robberies, ammunition, and masks. *Id.* at 56, 170.

2. A grand jury sitting in the Eastern District of Virginia indicted petitioner on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371, three counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and three counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner moved to suppress his statements and the evidence seized from his apartment. The district court held a hearing at which Agent Lawlor and petitioner both testified. Petitioner testified that, contrary to Agent Lawlor's testimony, he had not been advised of his *Miranda* rights until after he had made all of the statements at issue.

Following the hearing, the district court granted petitioner's suppression motions. J.A. 140-155. With respect to the statements, the district court found that petitioner had been in custody during the questioning, and the court credited petitioner's testimony that he had not been read his *Miranda* rights and had not executed a waiver until after he had made all of the statements at issue. *Id.* at 151-155. The court also suppressed the evidence seized from petitioner's apartment pursuant to a search warrant.[2]

3. The government filed a motion for reconsideration. In support of its motion, the government submitted the affidavit of Detective Durkin, who was present throughout petitioner's interview. In his affidavit, Detective Durkin stated that petitioner had been read *Miranda* warnings and executed the written waiver before petitioner gave his more elaborate statement acknowledging his activities with Rochester on the day of the robbery. J.A. 102-103. The government further submitted petitioner's own handwritten statement acknowledging that he had been advised of his rights. *Id.* at 105. The government also argued (*id.* at 87) that even if petitioner's statements had been elicited in violation of *Miranda*, they were voluntary and therefore admissible under 18 U.S.C. 3501, which provides in relevant part that "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given," 18 U.S.C. 3501(a), that "[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession," and that the "presence or absence" of any

---

[2] Petitioner also moved to suppress a leather backpack and solvent used to clean dye-stained money, which were recovered from a search of the getaway car. The district court denied that motion. J.A. 144-145 & n.2.

particular factors "need not be conclusive on the issue of voluntariness of the confession," 18 U.S.C. 3501(b).

The district court denied the motion for reconsideration on the ground that the government had failed to establish that the additional evidence it proffered had been unavailable at the time of the suppression hearing. J.A. 159. The district court did not address Section 3501. See *id.* at 157-161.

4. The government appealed, and a divided panel of the court of appeals reversed. J.A. 162-225.

a. With respect to petitioner's statements, the court first held that the district court did not abuse its discretion in denying the government's motion for reconsideration, because the government had not availed itself of earlier opportunities to offer the additional evidence that petitioner had received *Miranda* warnings. J.A. 177-184. The court then turned to Section 3501. Although the majority noted that the government explicitly declined to make any argument based on 18 U.S.C. 3501 on appeal, Gov't C.A. Br. 34 n.19, the majority found that it was required to consider whether petitioner's statements were admissible under Section 3501 notwithstanding the absence of prior *Miranda* warnings. J.A. 184-191.

The majority held that "[Section] 3501, rather than the judicially created rule of *Miranda*," governs the admissibility of confessions in federal court. J.A. 211. The majority noted that Congress had enacted Section 3501 "with the express purpose of legislatively overruling *Miranda*," *id.* at 197, and that Congress had the authority to do so only if the rules set forth in *Miranda* were not required by the Constitution, *id.* at 201. Relying on cases decided after *Miranda* in which this Court "referred to the warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution,'" *id.* at 203-207 (citations omitted), the court of appeals held that "Congress necessarily possesses the legislative authority to supersede the conclusive presumption

created by *Miranda* pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts," *id.* at 207-208. The majority noted the dissent's contention that, under the majority's theory, it remained unexplained how this Court could continue to apply *Miranda* to state prosecutions if *Miranda* is not a constitutional rule. But the majority found that to be an "interesting academic question" that "has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution." *Id.* at 208 n.21.

The court of appeals therefore reversed the district court's order suppressing petitioner's statements. J.A. 211-212. Because the district court had refused to suppress the fruits of petitioner's statements, the court of appeals also concluded that the district court had "necessarily found that [petitioner's] statements were voluntary under the Fifth Amendment" and thus admissible under Section 3501. *Ibid.*[3]

b. Judge Michael dissented in part. He would not have addressed the applicability of Section 3501, because the government had not invoked the statute and the court of appeals did not have the benefit of full briefing and argument on the issue. J.A. 218-223. In his view, it was "a mistake for our court to push § 3501 into this case." *Id.* at 221.

5. Petitioner sought rehearing en banc. The government filed a brief in support of partial rehearing en banc. In that brief (at 12), the government argued that the *Miranda* jurisprudence has a constitutional basis, and, accordingly, the lower federal courts are bound by *Miranda* unless and

---

[3] The court of appeals also reversed the district court's order suppressing the physical evidence seized from petitioner's apartment. J.A. 212-217. Judge Michael disagreed with the majority's conclusion that the search warrant was sufficiently particular, but agreed that the evidence seized was nonetheless admissible pursuant to the good-faith exception. *Id.* at 224-225. This Court did not grant certiorari on this issue.

until the Supreme Court itself overrules it. *Id.* at 6 (citing *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)). The government thus concluded that the lower federal courts "may not apply Section 3501 to admit confessions that *Miranda* would exclude." *Id.* at 12.

The court of appeals denied rehearing en banc by an 8-5 vote. J.A. 226. This Court granted certiorari, limited to the first question presented by the petition, *i.e.*, whether Section 3501 "was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court's decision in *Miranda*." Pet. i; 120 S. Ct. 578 (1999).[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3501 cannot constitutionally authorize the admission of a confession that would be excluded from evidence under this Court's *Miranda* cases. *Miranda* and its progeny represent an exercise of this Court's authority to implement and effectuate constitutional rights, and, accordingly, those decisions are binding on Congress. See *City of Boerne* v. *Flores*, 521 U.S. 507, 516-529 (1997); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The voluntariness test in Section

[4] We continue to believe that the court of appeals erred in concluding that it was free to depart from this Court's decision in *Miranda* based on a perception that that case was undermined by other precedents, and we also note (as we did in our brief in support of partial rehearing en banc at 13 n.5 and in our brief at the petition stage at 37-38 n.24) that, if the court of appeals had ordered the district court to consider the evidence presented by the government on motion for reconsideration, it might have avoided an unnecessary decision of a constitutional question, see *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Fourth Circuit nevertheless reached the validity of Section 3501. If this Court reverses the Fourth Circuit on that issue, and if the Fourth Circuit determines not to revisit its affirmance of the district court's refusal to hear the government's supplemental evidence on motion for reconsideration, the case will return to the district court for trial of petitioner based on the physical and testimonial evidence that shows petitioner's complicity in the charged bank-robbery and firearms offenses.

3501 cannot supersede *Miranda* on the theory that *Miranda* represents only supervisory "rules of procedure and evidence," J.A. 208, because this Court's consistent application of *Miranda* to the States demonstrates that *Miranda* is a constitutionally based ruling. Section 3501 could be validly applied to require the admission in evidence of confessions that would be inadmissible under *Miranda* and its progeny only if this Court overrules its decisions in *Miranda* and the cases that have followed it. Taking into account principles of stare decisis and the role *Miranda* has come to play in the criminal justice system, we do not believe that *Miranda* should be overruled. Rather, we believe, as this Court concluded more than a decade ago, that *Miranda* "strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights." *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986).

I. Before this Court's decision in *Miranda* in 1966, the admissibility of a confession was judged under a voluntariness test, developed under the Due Process Clause, that took into account the totality of the circumstances. *Miranda* prescribed an additional inquiry based on the Fifth Amendment's Self-Incrimination Clause, which had been made applicable to the States in 1964. Two years after the decision in *Miranda*, Congress enacted Section 3501 to overrule *Miranda* in federal prosecutions and to return the law to the due process test that this Court had found inadequate in *Miranda*. Section 3501(a) accordingly provides that "a confession * * * shall be admissible in evidence if it is voluntarily given." Section 3501(b) specifies a list of non-exclusive factors that a judge "shall take into consideration" in making the voluntariness determination, but it provides that "[t]he presence or absence of any of [those factors] need not be conclusive." Because the factors listed in Section 3501(b) are non-exclusive, the weight to be given them is not specified, and their presence or absence is not determinative,

Section 3501 would, if valid, return the law applied in federal prosecutions to its pre-*Miranda* state.

Returning the law to its pre-*Miranda* state is beyond Congress's power, because this Court's decision in *Miranda* was a constitutional decision and Congress may not overrule constitutional decisions of this Court. It is true that this Court has referred to the rule of *Miranda* as a "prophylactic rule" that sweeps more broadly than does the Fifth Amendment itself and that requires the suppression of some confessions that would be deemed voluntary under the due process totality-of-the-circumstances test. Nonetheless, this Court has also frequently stated that *Miranda*'s requirements are based on its power to interpret and apply the Constitution. In addition, this Court has consistently applied *Miranda* to the States, including in three of the four consolidated cases that were resolved in the *Miranda* decision itself. Although the court of appeals believed that the application of *Miranda* to the States presented only an "interesting academic question," such application would not be permissible under the "supervisory" authority of this Court. The application of *Miranda* to the States therefore establishes that *Miranda*'s requirements are constitutional in nature. This Court has also held that the *Miranda* rules are applicable on federal habeas review of state convictions—a holding that can be explained only on the premise that *Miranda* states a rule of constitutional law.

The court of appeals relied in part on this Court's statements in *Miranda* itself that it did not intend to create a "constitutional straitjacket" that would preclude any legislative action in this area, 384 U.S. at 467, and that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation," *id.* at 490. But the Court added several times in its opinion that any such legislative solution must be "fully as effective as [the *Miranda* rules themselves] in informing accused persons of their right of silence and in

affording a continuous opportunity to exercise it." *Ibid.* The Court thus made clear that while the Constitution does not itself require that any particular measures be taken, nonetheless *some* measures must be taken that will be adequate for the purpose at hand—here, the protection of the Fifth Amendment privilege. Congress may not simply overrule *Miranda* and enact legislation like Section 3501 that provides no more protection to the Fifth Amendment privilege than did pre-*Miranda* law. The recognition in *Miranda* that Congress may choose to play a role in this area provides no support for the proposition that Congress may override a determination by this Court regarding what is necessary to provide adequate protection to constitutional rights.

II. Because the *Miranda* decision is of constitutional dimension, Congress may not legislate a contrary rule unless this Court were to overrule *Miranda*. We submit that principles of stare decisis do not favor the overruling of *Miranda*, and we do not request the Court to take that step. In the thirty-four years since that decision was handed down, it has become embedded in the law and defined through the decisions of this Court. If *Miranda* were to be overruled, this Court would have to disavow a long line of its cases that have interpreted *Miranda*, and it would have to overrule directly at least eleven cases that have reaffirmed that a confession obtained in violation of *Miranda* must be suppressed in the government's case-in-chief. At this date, there is no sufficient justification to overrule the balance struck in *Miranda* between the need for police questioning and the privilege against compelled self-incrimination, and there are substantial benefits to retaining that balance.

We acknowledge that there is a profound cost to the truthfinding function of a criminal trial when probative evidence is suppressed. That value necessarily must weigh heavily in this Court's appraisal of the continued validity of *Miranda*. In many respects, however, *Miranda* is beneficial to law enforcement. Its core procedures provide clear guid-

ance to law enforcement officers, and thus are not difficult to administer. If those procedures are followed, a defendant will frequently forgo any challenge to the voluntariness of an ensuing confession, because the fact that a defendant chooses to speak after receiving *Miranda* warnings is highly probative that his confession was voluntary. By contrast, the totality-of-the-circumstances test that was the sole measure of a confession's admissibility before *Miranda*, and that would govern in its absence, would be much more difficult for the police and the courts to apply and much more uncertain in application.

There is no sufficient change in the factual premises on which this Court based its decision in *Miranda* that would justify revisiting its holding. Although technological changes—such as the availability of videotaping—might be of relevance as a part of a package of safeguards intended to provide alternative protection for the Fifth Amendment privilege, Section 3501 does not adopt those safeguards or any others to ensure that a suspect is aware of his rights and has an opportunity to exercise them.

Finally, both the confidence of the public in the fairness of the criminal justice system and the stability of this Court's constitutional jurisprudence are of surpassing importance to the system of justice, and each may be expected to suffer if *Miranda* were overruled. Those values weigh heavily against discarding the essence of the balance that the Court struck in *Miranda*. Accordingly, *Miranda* should not be overruled, and Section 3501 cannot constitutionally authorize the admission of a statement that would be excluded under this Court's *Miranda* cases.

ARGUMENT

I. SECTION 3501 COULD BE VALIDLY APPLIED TO REQUIRE THE ADMISSION IN EVIDENCE OF CONFESSIONS THAT WOULD BE INADMISSIBLE UNDER *MIRANDA* AND ITS PROGENY ONLY IF THIS COURT WERE TO OVERRULE ITS DECISIONS IN *MIRANDA* AND THE CASES THAT HAVE FOLLOWED IT

The text and legislative history of Section 3501 demonstrate that it was intended to restore the pre-*Miranda* totality-of-the-circumstances voluntariness test as the sole test for admitting confessions in federal court.[5] An examination of this Court's cases, however, reveals that this Court decided *Miranda*, and has continued to apply it in numerous subsequent cases, in the exercise of its power to interpret and apply the Constitution. Accordingly, unless this Court overrules its decision in *Miranda*, Congress does not have the authority to return the law to its pre-*Miranda* state. *City of Boerne* v. *Flores*, 521 U.S. 507, 516-529 (1997). Section 3501 therefore may not validly be applied to permit the admission of a confession that would be inadmissible under *Miranda* and its progeny.

A. Section 3501 Was Intended To And Does Return To The Pre-*Miranda* Voluntariness Test

1. In *Brown* v. *Mississippi*, 297 U.S. 278 (1936), this Court first reversed a criminal conviction on the ground that it was based on a confession that was obtained by physical force in violation of the Due Process Clause. As the Court explained in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223 (1973), "[i]n some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*,

---

[5] Except where otherwise indicated, our references to Section 3501 refer only to Section 3501(a) and (b). The balance of Section 3501 addresses other issues not pertinent here. See note 14, *infra*.

378 U.S. 478 [(1964)], the Court was faced with the necessity of determining whether in fact the confessions in issue had been 'voluntarily' given." The due process "voluntariness" test that emerged from those cases demands an inquiry into "whether a defendant's will was overborne," *id.* at 226, and it requires a reviewing court to "assess[] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," *ibid.* The Court emphasized in *Schneckloth* that "none of [the confession cases] turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Ibid.*

2. In 1964, the Supreme Court decided *Malloy* v. *Hogan*, 378 U.S. 1 (1964), which held that the Fifth Amendment's Self-Incrimination Clause is applicable to the States because it is incorporated in the Fourteenth Amendment's Due Process Clause.[6] Two years later in *Miranda*, the Court thus addressed afresh the issue of the admissibility of confessions in state courts, operating for the first time under the Self-Incrimination Clause, rather than the Fourteenth Amendment's Due Process Clause. The Court reached the now-familiar conclusion that statements stemming from custodial interrogation of a suspect are inadmissible at trial unless the police first provide the suspect with a set of four specific warnings.[7] 384 U.S. at 444. The Court noted that, while it

[6] See *Michigan* v. *Tucker*, 417 U.S. 433, 442-443 (1974) ("Th[e] privilege had been made applicable to the States in *Malloy* v. *Hogan* * * * and was thought to offer a more comprehensive and less subjective protection than the doctrine of previous cases.").

[7] Those warnings are that (1) the defendant has the right to remain silent; (2) any statement he makes may be used as evidence against him; (3) he has the right to the presence of an attorney; and (4) if he cannot afford an attorney, one will be appointed for him. 384 U.S. at 479. The Court made clear that, in specifying warnings-and-waiver procedures, it did not preclude Congress and the States from "develop[ing] their own safeguards for the privilege, so long as they are fully as effective as those

might not find statements taken without the warnings "to have been involuntary in traditional terms," *id.* at 457, procedural safeguards were necessary because custodial interrogation is inherently coercive. The Court thus reasoned that, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458; see *id.* at 467.

3. In 1968, Congress enacted Section 3501. As the court of appeals noted, "[b]ased on the statutory language alone, it is clear that Congress enacted § 3501 with the express purpose of returning to the pre-*Miranda* case-by-case determination of whether a confession was voluntary." J.A. 199.[8] Section 3501(a) provides in pertinent part that "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given." Section 3501(b) provides that a trial judge "determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including" five factors. Those factors are

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, * * * (2) whether such defendant knew the nature of the offense with

described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." *Id.* at 490. See pp. 26-29, *infra*.

[8] The language of Section 3501 requires the admission of all voluntary confessions. Accordingly, it would logically extend to post-arraignment confessions that are taken in violation of the Sixth Amendment and would be inadmissible under *Massiah* v. *United States*, 377 U.S. 201 (1964), and to confessions that were the fruits of a Fourth Amendment violation and hence inadmissible under *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Applying Section 3501 according to its terms would therefore apparently require that two additional lines of cases be overruled. Neither, however, is at issue in this case.

> which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. 3501(b). Section 3501(b) goes on to specify, however, that "[t]he presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

In setting forth the basic rule that a confession "shall be admissible in evidence if it is voluntarily given," Section 3501(a) restates the due process "voluntariness" test that governed the admissibility of confessions before this Court decided *Miranda*. Section 3501(b) confirms that the statute's "voluntariness" test is identical to that applied under pre-*Miranda* law by providing that "the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession." Compare *Schneckloth*, 412 U.S. at 226 (before *Miranda*, admissibility of confession was based on "totality of all the surrounding circumstances"); *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963) ("an examination of all of the attendant circumstances"); *Gallegos* v. *Colorado*, 370 U.S. 49, 55 (1962) ("There is no guide to the decision of cases such as this, except the totality of circumstances."); *Reck* v. *Pate*, 367 U.S. 433, 440 (1961) ("all the circumstances attendant upon the confession must be taken into account"); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant.").

The listing of five specific factors in Section 3501(b) that a court "shall take into consideration" does not alter the conclusion that Section 3501 purports to reinstate the pre-*Miranda* voluntariness test. It is difficult to see how the enumeration of any number of non-exclusive factors would differ from the pre-existing analysis, which required consideration of *all* factors that might bear on voluntariness. In this respect, it is significant that the five factors are neither exclusive nor determinative—as Section 3501(b) states, their "presence or absence * * * need not be conclusive on the issue of voluntariness." Nor are they necessarily the most significant factors; the use or threat of violence or other similar treatment by an interrogator, for example, could easily dictate the conclusion that a confession is involuntary without regard to any other factors.[9]

Furthermore, the five factors had specifically been recognized by this Court as significant under the pre-*Miranda* voluntariness test, so that their listing in Section 3501(b) marked no change from pre-*Miranda* law. For example, the presence of counsel during interrogation had always been an important factor in establishing voluntariness.[10] Two other

---

[9] See, *e.g.*, *Stein* v. *New York*, 346 U.S. 156, 182 (1953) ("Physical violence or threat of it * * * serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim."); *Brown* v. *Mississippi*, 297 U.S. 278, 285-286 (1936) ("The rack and torture chamber may not be substituted for the witness stand."); cf. *Ashcraft* v. *Tennessee*, 322 U.S. 143, 151 (1944) (defendant questioned by relays of interrogators for 36 hours without sleep).

[10] See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503, 507 (1963) (holding confession involuntary where police refused defendant's requests to call attorney); *Gallegos* v. *Colorado*, 370 U.S. 49, 55 (1962) (holding confession involuntary where there was a "failure to see to it that [the defendant] had the advice of a lawyer or a friend"); *Spano* v. *New York*, 360 U.S. 315, 323 (1959) (holding confession involuntary where police "ignored [the defendant's] reasonable requests to contact the local attorney whom he had

factors—the defendant's knowledge of his right to remain silent and of his right to the assistance of counsel—had also been a regular part of the analysis.[11] Since its decision in

already retained"); *Cicenia* v. *Lagay*, 357 U.S. 504, 509 (1958) (holding confession voluntary, but noting that "defendant's lack of counsel [is] one pertinent element"); *Leyra* v. *Denno*, 347 U.S. 556, 561 (1954) (holding confession involuntary where defendant was "unprotected by counsel" at time of confession); *Haley* v. *Ohio*, 332 U.S. 596, 600 (1948) (plurality opinion) (holding confession involuntary where "[n]o lawyer stood guard * * * to see to it that [the police] stopped short of the point where [the defendant] became the victim of coercion"); *Malinski* v. *New York*, 324 U.S. 401, 405 (1945) (holding confession involuntary where among the "circumstances [that] stand out" are that defendant "was not allowed to see a lawyer, though he asked for one"); *Lisenba* v. *California*, 314 U.S. 219, 240 (1941) (holding confession voluntary where "[c]ounsel had been afforded full opportunity to see [defendant] and had advised him," but noting that special scrutiny is required where defendant "is subjected to questioning by officers for long periods, and deprived of the advice of counsel").

[11] See, *e.g.*, *Haynes*, 373 U.S. at 510-511 (holding confession involuntary where defendant not "advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney"); *Culombe* v. *Connecticut*, 367 U.S. 568, 609-610 (1961) (opinion of Frankfurter, J.) (holding confession involuntary where "[t]here is no indication that at any time [the defendant] was warned of his right to keep silent."); *Crooker* v. *California*, 357 U.S. 433, 438 (1958) (holding confession voluntary where there was "police statement to [the defendant] that he did not have to answer questions"); *Ashdown* v. *Utah*, 357 U.S. 426, 428 (1958) (holding confession voluntary where, *inter alia*, interrogator "advised [the defendant] that she did not have to answer any questions and that she was entitled to consult with an attorney"); *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958) (holding confession involuntary where defendant "was not advised of his right to remain silent or of his right to counsel"); *Brown* v. *Allen*, 344 U.S. 443, 476 (1953) (holding confession voluntary where "[t]here is evidence that petitioner was told he could remain silent and that any statement he might make could be used against him"); *Harris* v. *South Carolina*, 338 U.S. 68, 70 (1949) (opinion of Frankfurter, J.) (holding confession involuntary where there was "failure to advise the petitioner of his rights"); *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949) (opinion of Frankfurter, J.) (holding confession involuntary where defendant was "not informed of his right to

Brown, the Court had frequently adverted to the length of time the defendant had been held in custody as an important factor in determining voluntariness, and that factor had apparently been dispositive in some cases.[12]

One Section 3501(b) factor that had received less attention in this Court's pre-*Miranda* confession cases was whether the "defendant knew the nature of the offense with which he was charged or of which he was suspected." 18 U.S.C. 3501(b). In at least one case, however, in determining the voluntariness of a confession, the Court had referred to the fact that "[n]o warrant was read to [the defendant] and he was not informed of the charge against him." *Harris* v. *South Carolina*, 338 U.S. 68, 69 (1949); see also *id.* at 72

remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it"); *Haley*, 332 U.S. at 598 (plurality opinion) (holding confession involuntary where "[a]t no time was [the defendant] advised of his right to counsel.").

[12] See *Stein* v. *New York*, 346 U.S. at 187 (Because "[t]o delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third-degree' methods, * * * we regard such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion."); see also *Reck* v. *Pate*, 367 U.S. 433, 440 (1961) (holding confession involuntary where defendant held four days before first confession and an additional four days before arraignment); *Thomas* v. *Arizona*, 356 U.S. 390, 401 n.8 (1958) (holding confession voluntary where, "[u]nlike many cases where this Court has found coercion, there apparently was no failure here to comply with the state statute requiring that a prisoner be taken before a magistrate without unnecessary delay after arrest"); *Fikes* v. *Alabama*, 352 U.S. 191, 194-197 (1957) (holding confession involuntary where defendant held without arraignment five days before first confession and an additional five days before second confession); *Watts* v. *Indiana*, 338 U.S. 49, 52-53 (1949) (opinion of Frankfurter, J.) (holding confession involuntary where defendant held five days without arraignment before confessing); *Turner*, 338 U.S. at 64 (opinion of Frankfurter, J.) (holding confession involuntary where defendant held five days without arraignment before confessing); *Chambers* v. *Florida*, 309 U.S. 227, 239 (1940) (holding confession involuntary where defendants held without arraignment incommunicado five days).

(Douglas, J., concurring) (mentioning same factor). In any event, Section 3501 does not dictate the weight to be given this factor in the analysis of whether a confession is voluntary. In *Colorado* v. *Spring*, 479 U.S. 564, 577 (1987), the Court "h[e]ld that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Accordingly, the defendant's knowledge of the crimes of which he is suspected is an insignificant factor in the voluntariness inquiry.[13]

4. The history of Section 3501 confirms that Congress intended Section 3501 to overrule this Court's decision in *Miranda* and restore the totality-of-the-circumstances test of voluntariness in federal prosecutions. Senator McClellan introduced the original bill, S. 674, to "rectify" what he perceived as "the mockery of justice" reflected in the "5-to-4" *Miranda* decision and to restore "voluntariness [as] the only test" for determining the admissibility of a confession. 113 Cong. Rec. 1583, 1584 (1967).[14] Senator McClellan ex-

[13] Indeed, because a defendant's knowledge of the crimes of which he is suspected is "not relevant" to the validity of a defendant's waiver of his rights under *Spring*, even if Section 3501 expressly gave that factor great weight in determining whether a confession was admissible, it would not accomplish any purpose in protecting the defendant's Fifth Amendment rights. It would therefore not respond to any concern underlying this Court's determination in *Miranda* that exclusive reliance on the pre-*Miranda* "voluntariness" test was inadequate.

[14] The bill was part of Title II of the Omnibus Crime Control and Safe Streets Act of 1967. Title II also contained provisions designed to overturn this Court's decisions in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), which held that delay before bringing an accused before a magistrate bars the admission of the accused's pre-arraignment confession, and *United States* v. *Wade*, 388 U.S. 218 (1967), which established the right of an accused to have counsel at police line-ups. Those provisions ultimately were enacted as 18 U.S.C. 3501(c) and 3502, which are not at issue in this case. Title II also contained

pressed similar views during the Senate hearings on the bill in the Spring and Summer of 1967. *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Crim. Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1174 (1967) (*Hearings*) ("In view of the *Miranda* decision, we have the bill that I introduced which would restore what had been a traditional procedure heretofore."). And Attorney General Ramsey Clark advised the Senate that S. 674 was unconstitutional to the extent it "intended to dispense with the requirement that [*Miranda*] warnings be given and to substitute a flexible standard that the presence or absence of such warnings need only be *considered* on the issue of voluntariness." *Id.* at 82.[15]

The Senate Committee Report accompanying Section 3501 stated that the Committee was convinced by the evidence presented during the Senate hearings "that the rigid and inflexible requirements of the majority opinion in the

provisions that the Senate failed to pass which would have stripped the Supreme Court and federal courts of jurisdiction to review state-court decisions admitting confessions and would have abolished federal habeas corpus review of state-court judgments. See S. Rep. No. 1097, 90th Cong., 2d Sess. 10 (1968); 114 Cong. Rec. 11,189 (1968).

[15] In its original form, S. 674 provided in subsection (b) that a court "shall take into consideration all the circumstances surrounding the giving of the confession," but nothing in the bill expressly stated that a court could find a confession voluntary in the absence of the warnings set forth in *Miranda*. *Hearings* 74. The Attorney General of California therefore testified that the Senate should close that "possible loophole" by amending S. 674 "to provide that the presence or absence of any of the factors listed in subsection (b) shall not be conclusive on the issue of voluntariness." *Hearings* 926 (statement of Thomas C. Lynch). The bill was subsequently amended to provide, as it presently does, that "[t]he presence of absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive of the issue of voluntariness," thereby removing any doubt that Congress intended to dispense with the requirements laid down in *Miranda*.

Miranda case are unreasonable, unrealistic, and extremely harmful to law enforcement" and that the proper test for admissibility should be the traditional "totality of circumstances" test of voluntariness that was endorsed by the dissenting Justices in *Miranda*. S. Rep. No. 1097, 90th Cong., 2d Sess. 46, 49-51 (1968).[16] During the weeks of debate concerning Section 3501, members of both the House and Senate similarly expressed their understanding that the statute was designed to restore the law on the admissibility of confessions as it existed before *Miranda*.[17]

---

[16] The committee members in the minority agreed that Section 3501 "repeal[ed]" *Miranda* by making "voluntariness the sole criterion of the admissibility of a confession in a Federal court." S. Rep. No. 1097, *supra*, at 148.

[17] See, *e.g.*, 114 Cong. Rec. 11,206 (1968) (Sen. McClellan) (statute would "restore" voluntariness test as "the only test * * * in determining admissibility"); *id.* at 11,594 (Sen. Morse) (Section 3501 "would overrule" *Miranda*); *id.* at 11,612 (Sen. Thurmond) (statute "would restore the test for admissibility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness"); *id.* at 13,202 (Sen. Scott) (statute "would restore the test which had been in use and considered constitutional until recent Supreme Court decisions, most notably *Miranda* v. *Arizona*"); *id.* at 14,136 (Sen. Fong) ("Sections 3501(a) and (b) * * * would overrule all of the Miranda standards and render them merely as guidelines to determine the admissibility and the weight to be given a confession."); *id.* at 14,158 (Sen. Hart) (statute "would repeal" *Miranda*); *id.* at 14,167 (Sen. McIntyre) (statute "would overrule [*Miranda*], whereby the Court established a constitutional requirement * * * above and beyond the traditional test of voluntariness"); *id.* at 14,176 (Sen. Erin) ("John Marshall said that voluntary confessions are admissible. And this is what the Constitution meant until the 13th day of June, 1966, when an attempt was made by five Judges to change the Constitution over the opposition of the other four Judges."); *id.* at 16,066 (Rep. Cellar) ("the main purpose * * * is to overrule [*Miranda*]"); *id.* at 16,075 (Rep. Rogers) (statute "is the first step to reverse the actions of the Supreme Court of the United States in favoring the criminals"); *id.* at 16,296 (Rep. Randall) (statute "simply provides that confessions may be voluntarily given, notwithstanding the line of decisions announced by the U.S. Supreme Court").

B. This Court's Decisions In *Miranda* And The Cases That Have Followed It Reveal That The *Miranda* Rule Is Based On This Court's Authority To Interpret And Apply The Constitution

1. In *Miranda* itself, the Court left no doubt that it was basing its decision on the Court's authority to interpret and apply the Constitution. The Court began its opinion by noting that it had granted certiorari "to explore some facets of the problems * * * of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-442. The balance of the opinion is replete with references to the constitutional basis for the decision—"rights grounded in a specific requirement of the Fifth Amendment of the Constitution." *Id.* at 489. As the Court held, the unwarned confessions in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege." *Id.* at 491.[18]

---

[18] See also 384 U.S. at 445 ("The *constitutional* issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody.") (emphasis added), 457 (referring to the Court's "concern for adequate safeguards to protect precious *Fifth Amendment rights*") (emphasis added), 458 (examining "history and precedent *underlying the Self-Incrimination Clause* to determine its applicability in this situation") (emphasis added), 476 ("The requirement of warnings and waiver of rights is a fundamental *with respect to the Fifth Amendment* privilege and not simply a preliminary ritual to existing methods of interrogation.") (emphasis added), 478 ("The fundamental import *of the privilege* while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.") (emphasis added), 479 ("The whole thrust of our foregoing discussion demonstrates that *the Constitution has prescribed the rights of the individual when confronted with the power of government* when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself.") (emphasis added),

2. In a line of cases beginning with *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the Court has held that a failure to apply *Miranda*'s interrogation safeguards is not per se a constitutional violation and that a statement will not invariably be deemed "compelled" in violation of the Fifth Amendment simply because it was unwarned. In *Tucker*, the Court declined to suppress the testimony of a witness whose identity was learned from a statement taken from the defendant in violation of *Miranda*, because the Court found that the police conduct at issue did not "breach the right against compulsory self-incrimination[,] * * * but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege," 417 U.S. at 445-446, and because "[t]he deterrent purpose of the exclusionary rule" would not have been served in that case, *id.* at 447.

Since *Tucker*, this Court has frequently observed that the *Miranda* rules are "prophylactic" in character and that an unwarned statement is not necessarily "compelled" in violation of the Fifth Amendment. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 457 (1994); *Duckworth* v. *Eagan*, 492 U.S. 195, 203 (1989); *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). Consistent with the description of *Miranda*'s procedures as prophylactic, the Court has weighed the advantages and disadvantages of *Miranda* in defining its application. In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the Court declined to suppress the fruits of an unwarned statement, emphasizing that the "fruit of the poisonous tree" doctrine "assumes the existence of a constitutional violation" (*id.* at 305), but that "[t]he *Miranda* exclusionary rule * * * may be triggered even in the absence of a Fifth Amendment violation." *Id.* at

---

481 n.52 ("[d]ealing as we do here with *constitutional standards* in relation to statements made") (emphasis added), 490 ("the issues presented are of *constitutional dimensions* and must be determined by the courts") (emphasis added).

306. The Court has also recognized a "public safety" exception to *Miranda*'s "prophylactic rule," stating that a violation of the procedural safeguards of *Miranda* is not itself a violation of the Fifth Amendment. *New York* v. *Quarles*, 467 U.S. 649, 657 (1984). And the Court has concluded that unwarned statements may be used to impeach a testifying defendant at trial, notwithstanding the violation of *Miranda*, if the traditional test for "voluntariness" is satisfied. See *Oregon* v. *Hass*, 420 U.S. 714, 722-723 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

Considered in isolation, the language used in *Tucker* and its progeny that a violation of *Miranda* is not itself a violation of the Constitution could be read to support an inference that *Miranda* is not a constitutional rule. Indeed, the Fourth Circuit read those statements to mean that *Miranda* is simply a "judicially created rule" that may be supplanted by legislation. J.A. 211. A well-established line of this Court's cases, however, requires the conclusion that *Miranda*, as applied by this Court, does indeed rest on a constitutional basis.

3. Beginning with *Miranda* itself, this Court has repeatedly applied the warnings requirement, and its associated suppression remedy, to cases arising in state courts.[19] See, *e.g.*, *Stansbury* v. *California*, 511 U.S. 318 (1994) (per curiam); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990); *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Edwards* v. *Arizona*, 451 U.S. 477, 481-482 (1981). Although this Court has the power to announce rules of procedure and evidence binding on federal courts, it has consistently disclaimed—both before and after *Miranda*—any such supervisory authority over state

---

[19] Three of the four consolidated cases in *Miranda* itself arose in state courts, as did *Tucker*, *Elstad*, *Quarles*, and other cases on which the court of appeals relied in concluding that *Miranda* lacks a constitutional basis. The fourth of the consolidated cases in *Miranda* involved a federal conviction (*Westover* v. *United States*, No. 761).

courts. The Court's authority in state cases "is limited to enforcing the commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). See *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Cicenia* v. *Lagay*, 357 U.S. 504, 508-509 (1958) ("Were this a federal prosecution we would have little difficulty in dealing with [the admissibility of the confession] under our general supervisory power over the administration of justice in the federal courts. But to hold that what happened here violated the Constitution of the United States is another matter.") (citation omitted). Because federal judges "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution," *Harris* v. *Rivera*, 454 U.S. 339, 344-345 (1981) (per curiam), the Court's continued application of *Miranda*'s exclusionary rule in state cases necessarily means that *Miranda* rests on the Court's authority to apply the Constitution.

The same point is manifest in this Court's holding that claims of *Miranda* violations are cognizable on federal habeas review. See *Withrow* v. *Williams*, 507 U.S. 680, 690-695 (1993); see also *Thompson* v. *Keohane*, 516 U.S. 99 (1995). Habeas corpus is available only for claims that a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). Because *Miranda* is not a "law" or a "treaty," the Court's holding in *Withrow* necessarily depends on the premise that the requirements of *Miranda* implement and protect constitutional rights.

Significantly, this Court has regularly described the *Miranda* holding, and subsequent extensions of that holding, as resting on constitutional grounds. See, *e.g.*, *Illinois* v. *Perkins*, 496 U.S. 292, 296 (1990) (describing *Miranda* rules as resting on "the Fifth Amendment privilege against self-

incrimination"); *Butler* v. *McKellar*, 494 U.S. 407, 411 (1990) (noting holding of *Arizona* v. *Roberson* "that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation"); *Michigan* v. *Jackson*, 475 U.S. 625, 629 (1986) ("The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations."); *Moran* v. *Burbine*, 475 U.S. 412, 427 (1986) (describing *Miranda* as "our interpretation of the Federal Constitution"); *Edwards* v. *Arizona*, 451 U.S. 477, 481-482 (1981) (describing *Miranda* as having "determined that the Fifth and Fourteenth Amendments[]" required custodial interrogation to be preceded by advice concerning the suspect's rights). As those cases highlight, the Court's description of the *Miranda* rules as "prophylactic" does not mean that the rules are therefore extra-constitutional. As the Court stated in *Withrow*: "'[p]rophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'" 507 U.S. at 691 (emphasis omitted).

The court of appeals in this case did not confront the import of this Court's application of *Miranda* to the States and on habeas review, nor did the court of appeals address the Court's own description of its *Miranda*-based holdings as constitutional in nature. Rather, the court stated that, although it "raises an interesting academic question," this Court's application of *Miranda* in state prosecutions "has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution." J.A. 208 n.21. Any conclusion about the legal source of *Miranda*, however, must take into account the fact that the Court has applied that case to the States and on habeas review, since this Court could not do so if *Miranda* were a non-constitutional decision.

C. Congress May Not Overrule This Court's Decision In *Miranda*, Because That Decision Is Based On The Constitution And Congress May Not Overrule Constitutional Decisions Of This Court

When this Court decides a case on a statutory or supervisory basis, Congress has general authority to alter the law and undo the decision, within otherwise applicable constitutional limits. *Miranda*, however, was not a statutory or supervisory power case, but instead rests on constitutional grounds. Accordingly, unless this Court overrules *Miranda*, Section 3501 may not constitutionally be applied to permit admission of a confession that would be inadmissible under *Miranda*.

1. The court of appeals in this case suggested that Section 3501 is valid because "the Court [in *Miranda*] acknowledged that the Constitution did not require the warnings, disclaimed any intent to create a 'constitutional straitjacket,' repeatedly referred to the warnings as 'procedural safeguards,' and invited Congress and the States 'to develop their own safeguards for [protecting] the privilege.'" J.A. 203 (citations omitted; quoting *Miranda*, 384 U.S. at 467, 444, 490). That represents, however, a fundamental misunderstanding of this Court's decision in *Miranda*, based on truncated quotations from the Court's opinion and an untenable theory of this Court's authority to impose rules on the States.

2. The court of appeals' quotation of the *Miranda* opinion omits the crucial portion of the sentence that follows the portion quoted by the court. The full sentence in this Court's opinion in *Miranda* states that "Congress and the States are free to develop their own safeguards for the privilege, *so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.*" 384 U.S. at 490 (emphasis added). The Court therefore clearly did not merely invite Congress and the States to develop "their own

safeguards," regardless of their efficacy or adequacy, to replace the Court's *Miranda* holding. Instead, the Court invited Congress and the States to develop "their own safeguards" only if they were "fully as effective" as the *Miranda* rules to "inform[] accused persons of their right of silence and * * * afford[] a continuous opportunity to exercise it."

Indeed, the Court consistently emphasized in *Miranda* that legislation providing alternative safeguards had to satisfy the test of constitutional adequacy that the Court set forth in *Miranda*. For example, earlier in its opinion, the Court set forth the standard with even greater precision:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. *However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.*

384 U.S. at 467 (emphasis added). In at least two other places in its opinion, the Court similarly emphasized that any legislative alternative must meet this standard of adequacy. See *id.* at 476 ("The warnings required * * * in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any state-

ment made by a defendant.") (emphasis added), 478-479 ("Procedural safeguards must be employed to protect the privilege, *and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored,* the following measures are required.") (emphasis added).[20]

This could not be clearer. Although Congress and the States could surely seek to provide alternative safeguards for the Fifth Amendment privilege, such legislation would be valid only if the safeguards satisfied the constitutional standard of adequacy stated in *Miranda*.[21] Section 3501 does not satisfy that standard. Indeed, it does not attempt to do so. As Professor Wright has noted, "It is one thing to devise alternative safeguards and quite another to provide, as the

[20] Amicus Washington Legal Foundation argues that various post-violation remedies, such as criminal actions under 18 U.S.C. 241 and 242, civil actions under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and administrative actions under the Federal Tort Claims Act, are available to ensure that officers comply with the Fifth Amendment. Amicus Br. 14 (filed Nov. 1, 1999). None of those remedies—even if they are as readily available as amicus contends—purports to satisfy *Miranda*'s holding that alternatives must "notify the person of his right of silence and * * * assure that the exercise of the right will be scrupulously honored." 384 U.S. at 479.

[21] This circumstance—in which there is a goal that must be reached, but a variety of different means by which a legislature may reach that goal—is not unfamiliar in constitutional law. In its procedural due process cases, for example, this Court has made clear that the Constitution sets various minimum standards that must be satisfied, but that the legislature may select between a variety of possible procedures that would satisfy those standards. See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 542 (1971) (stating that "[w]e deem it inappropriate in this case to do more than lay down this requirement" and noting that "[t]he alternative methods of compliance are several"). See also Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279 (1975) ("[T]he elements of a fair hearing should not be considered separately; if an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another.").

1968 legislation does, that no safeguards are needed." 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 76, at 185 (3d ed. 1999).

3. In sum, the Court in *Miranda* expressly rested its decision on constitutional grounds, and the Court's continued application of *Miranda*'s requirements to the States and on habeas review cannot be explained on any ground other than that the Court regards those requirements as implementing and effectuating constitutional rights. The specific warnings articulated in *Miranda* are not required by the Fifth Amendment. But *Miranda* is of constitutional dimension and cannot be superseded by legislation that would return the law to its pre-*Miranda* state, as does Section 3501. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda*, 384 U.S. at 491. Accord *City of Boerne* v. *Flores*, 521 U.S. at 516-529. That principle has long been a fundamental feature of our constitutional structure of government. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Accordingly, before Section 3501 could be applied in a manner that is inconsistent with this Court's *Miranda* jurisprudence, the Court would have to reconsider and overrule *Miranda*.

II. *MIRANDA* SHOULD NOT BE OVERRULED

The resolution of whether *Miranda* should be overruled or reaffirmed raises fundamental questions and implicates competing interests of the highest order. Weighing those interests is not an easy task. But in our view, sound application of principles of stare decisis dictates that at this point in time, thirty-four years after *Miranda* was decided and many years after it has been absorbed into police practices, judicial procedures, and the public understanding, the *Miranda* decision should not be overruled. As Chief Justice Burger stated twenty years ago: "The meaning of *Miranda* has become reasonably clear and law enforcement

practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillary*, 474 U.S. 254, 265-266 (1986). While "*stare decisis* is not an 'inexorable command,'" especially in a constitutional case, *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854 (1992), "[e]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996).

The Court's judgment regarding whether to overrule prior cases "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 505 U.S. at 854. Among the considerations that govern are

> whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. at 854-855 (citations omitted). The Court has regularly sought guidance by applying these factors—costs and workability, reliance, developments in the law that have affected the validity of the past precedent, and a change or perceived change in factual premises—to determine whether prior precedents should be reconsidered or overruled. See, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 827-830 (1991); *Vasquez*, 474 U.S. at 265-266. In addition, in a case involving a precedent of the significance of *Miranda*, larger considerations enter into the calculus as well. Cf. *Casey*, 505 U.S. at 861.

A. Costs And Workability

The core holding of *Miranda* is that, absent a "fully effective equivalent," 384 U.S. at 476, see pp. 26-28, *supra*, statements that are obtained in custodial interrogation are inadmissible in the prosecution's case-in-chief unless the suspect, before speaking, was given the prescribed warnings and waived his rights to remain silent and to consult counsel. Any consideration of whether that holding should be overruled must begin with an assessment of *Miranda*'s costs and benefits, and whether *Miranda* has proven workable in practice.

1. There are undeniably instances in which the exclusionary rule of *Miranda* imposes costs on the truth-seeking function of a trial, by depriving the trier of fact of "what concededly is relevant evidence." *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986); see also, *e.g.*, *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 (1991) (the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990) (*Miranda*'s exclusionary rule "result[s] in the exclusion of some voluntary and reliable statements"); *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985) (loss of "highly probative evidence of a voluntary

confession" is a "high cost to legitimate law enforcement").[22] In our view, however, the cost of *Miranda*'s exclusionary rule does not so impede or undermine law enforcement that the overruling of *Miranda* is warranted. Rather, the judgment and experience of federal law enforcement agencies is that *Miranda* is workable in practice and serves several significant law enforcement objectives.[23] Indeed, in the

[22] The Court has made the same point in discussing the Fourth Amendment exclusionary rule. See, *e.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 364 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions."); *United States* v. *Leon*, 468 U.S. 897, 907 & n.6 (1984) ("The substantial social costs exacted by the exclusionary rule * * * have long been a source of concern. * * * 'Any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.'") (quoting *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (White, J., concurring)).

[23] A lively debate in the law reviews has considered whether the social scientific evidence demonstrates that *Miranda* has had any effect on the rates at which criminals are prosecuted and convicted. In our view, the social scientific evidence is at best inconclusive and certainly insufficient on which to base a decision to overrule an important constitutional precedent. Compare Paul G. Cassel & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998), with Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. Rev. 500 (1996), and John J. Donahue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147 (1998). See also Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397 (1999). The argument that *Miranda* should be superseded by Section 3501 to increase the number of confessions is also hopelessly at odds with the argument of amicus that Section 3501 continues to give law enforcement agents sufficient incentives to give *Miranda* warnings. See Br. Amicus Curiae of Washington Legal Found.

thirty-two years since the enactment of Section 3501, the United States has never asked this Court to reconsider its decision in *Miranda*.

2. *Miranda*'s core procedures are not difficult to administer. Federal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions. And the administration of *Miranda* warnings is useful, for a defendant who waives his rights will often forgo any challenge to the admissibility of an ensuing confession. In those instances in which such challenges nonetheless are made, compliance with *Miranda* helps ensure that statements will be found admissible because they were voluntary. Indeed, long before *Miranda* was decided, the Federal Bureau of Investigation had adopted a practice of administering warnings similar to those required by *Miranda* to all suspects before questioning them. See 384 U.S. at 483-488 & n.54. That practice was instituted to ensure that agents treat suspects fairly while simultaneously obtaining important investigative information and reliable statements that are admissible in court. See *id.* at 483 n.54 (noting statement of J. Edgar Hoover, then-Director of the FBI, explaining that the FBI's policy of giving warnings was based on the principle that "[l]aw enforcement, * * * in defeating the criminal, must maintain inviolate the historic liberties of the individual."). The FBI's policy was workable before *Miranda*, and the FBI has had very little difficulty complying with the bright-line core mandates of the *Miranda* decision since 1966.

The experience of other federal law enforcement agencies since *Miranda* has also confirmed that *Miranda* has proved workable in practice and is in many respects beneficial to law

13 (filed Nov. 1, 1999). If amicus's appraisal of the incentives provided by Section 3501 to give warnings is correct, replacing *Miranda* with Section 3501 would have little or no benefit in increasing the rate at which offenders confess.

enforcement. It is the policy of some agencies, such as the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms, to provide *Miranda* warnings not only before engaging in custodial interrogation, but also in some non-custodial settings. The experience of those agencies is that the core *Miranda* warnings and waiver framework is administrable and does not impede law enforcement. In short, federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations and the issuance of *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect.

3. This Court has frequently noted that it is a virtue of *Miranda* that it provides bright-line rules that can be readily applied by the police and the courts to a large variety of factual circumstances.[24] Indeed, even when, as in *New York* v. *Quarles*, 467 U.S. 649 (1984), the Court recognized an

[24] See *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988) ("We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*."); *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (*Miranda* has the "important virtue of informing police and prosecutors with specificity as to how a pretrial questioning of a suspect must be conducted.") (internal quotation marks omitted); *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986) ("As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application."); *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984) (noting "the simplicity and clarity" of *Miranda*); *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979) (*Miranda*'s "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts."); see also *New York* v. *Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment and dissenting in part) (*Miranda* rules have "afforded police and courts clear guidance on the manner in which to conduct a custodial investigation."). The Court has thus noted that "there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow* v. *Williams*, 507 U.S. 680, 695 (1993).

exception to the *Miranda* rules for public safety, the Court explained that "the exception will not be difficult for police officers to apply," 467 U.S. at 658, and that "police officers can and will distinguish almost instinctively" between questions permitted and prohibited under the exception, *id.* at 658-659.

While *Miranda* itself is generally workable, federal law enforcement agencies have encountered difficulties with some of the extensions of *Miranda* in *Edwards* v. *Arizona*, 451 U.S. 477, 480 (1981), and later cases. Those cases require that, once a suspect invokes his right to counsel during custodial interrogation, law enforcement agents may not later reinitiate questioning without counsel present, even on matters unrelated to the crime for which the suspect was being held and questioned. See *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990). Whatever difficulty is caused by those decisions, however, is more properly charged to the account of *Edwards* and *Roberson* than to *Miranda*, and any such difficulty would properly be far more relevant should the Court be faced with reconsideration of those decisions rather than *Miranda* itself. The *Miranda* doctrine has undergone a continuous course of development in this Court since 1966.[25] Insofar as it is shown

[25] In many respects, the Court has tailored the *Miranda* doctrine as necessary to make it more workable. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452 (1994) (ambiguous invocation of right to counsel does not require cessation of all questioning); *Berkemer* v. *McCarty*, 468 U.S. 420 (1984) (*Miranda* warnings not required in a routine traffic stop); *Quarles*, 467 U.S. at 657 (public safety exception). The Court has not recently decided an *Edwards* issue, but in *United States* v. *Green*, 504 U.S. 908 (1992) (No. 91-5121), the Court granted certiorari to review "[w]hether *Edwards* * * * requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation." The case became moot after oral argument when the respondent died. See 507 U.S. 545 (1993).

that some applications of *Miranda* create inequity or are otherwise unworkable, there is no reason to believe that the doctrine will not continue to develop in future years as appropriate.[26]

4. Finally, a return to a totality-of-the-circumstances test in all settings is unlikely to be more workable in practice than is the *Miranda* rule itself. Rather, it is likely to be more difficult to apply both for agents and courts. The underlying due process rule that confessions are inadmissible unless they are found voluntary under the traditional totality-of-the-circumstances test remains applicable, even if the *Miranda* warnings have been administered. See, *e.g.*, *Miller* v. *Fenton*, 474 U.S. 104 (1985). As a general matter, however, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. at 433 n.20. See also *Oregon* v. *Elstad*,

---

Had the case not become moot, the Court would have decided whether a further refinement to the *Edwards-Roberson* rules was appropriate.

[26] Another problem that can occur in applying *Miranda* is that officers who have detained or are questioning a suspect without arresting him may be found by a court to have applied a "restraint on freedom of movement of the degree associated with a formal arrest." *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995) (internal quotation marks omitted). In that situation, an officer may inadvertently fail to issue *Miranda* warnings. As this Court has noted, "the task of defining 'custody' is a slippery one, and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.'" *Oregon* v. *Elstad*, 470 U.S. at 309. It therefore stands to reason that in some close cases, the officers will make a mistake, but it will be a "reasonable" one under all the circumstances. While the Court has not considered whether to recognize an exception to *Miranda*'s suppression rule in such a case, it has adopted a rule in the Fourth Amendment exclusionary rule context for cases in which police acted in good-faith reliance on a warrant or authorization by another governmental actor. See *United States* v. *Leon*, 468 U.S. at 906-913; *Arizona* v. *Evans*, 514 U.S. 1, 15 (1995).

470 U.S. at 318 ("The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative [on the voluntariness of his statements]."); *Colorado* v. *Spring*, 479 U.S. at 576 ("Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."). In the absence of *Miranda*, additional pressure would be placed on the voluntariness doctrine to determine the result in close and difficult cases. Although many law enforcement agencies would continue to observe the *Miranda* procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings, others might significantly modify them, and some police officers would, in the "often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), fail to issue warnings at all before conducting custodial interrogation.

If *Miranda* warnings are not required, the result will be uncertainty for the police and an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard. That approach takes into account not only what the agents say and do, see, *e.g.*, *Miller*, 474 U.S. at 116, but also facts about the particular suspect (such as his maturity, education, physical condition, mental health, and knowledge of constitutional rights, see *Withrow*, 507 U.S. at 693 (citing cases)), about the circumstances of the questioning (the length of the detention, the length and nature of the interrogation, the physical constraints or deprivations imposed, the suspect's access to friends and relatives, see *id.* at 693-694; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973); *Miranda*, 384 U.S. at 445- 446), and other factors.[27]

---

[27] See also *Culombe* v. *Connecticut*, 367 U.S. at 601-602 (opinion of Frankfurter, J.) (relevant factors include "extensive cross-questioning," "undue delay in arraignment," "failure to caution a prisoner," "refusal to

As demonstrated by the thirty pre-*Miranda* confession cases decided by this Court under the due process test, see pp. 14-18, *supra* (discussing cases), the totality-of-the-circumstances voluntariness test is more difficult and uncertain in application than *Miranda*. Cf. *Minnick* v. *Mississippi*, 498 U.S. at 151 ("*Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness"). Its many variables would complicate the task of law enforcement in assessing what procedures would reliably secure admissible confessions.

B. Reliance Interests

Reliance interests are also an important factor, and rules of criminal procedure do not in general give rise to substantial reliance interests. See *Payne* v. *Tennessee*, 501 U.S. at 828.[28] As we note below, see pp. 49-50, *infra*, it is of significance, however, that the requirements of *Miranda* have shaped years of police conduct and governed decades of criminal prosecutions. Moreover, upsetting settled public expectations by overruling a constitutional precedent as well-known and widely applied as *Miranda* would tend to have a destabilizing effect on public confidence in the fairness of the criminal justice system and public trust in this Court's legitimacy.

---

permit communication with friends and legal counsel," "the duration and conditions of detention," "the manifest attitude of the police toward [the suspect], his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control").

[28] Criminal defendants are unlikely to have given unwarned confessions in reliance on the belief that they would not be used in the prosecution's case-in-chief. Insofar as the government has taken action to foster such a belief in a given case, cf. *California Attorneys for Criminal Justice* v. *Butts*, 195 F.3d 1039, 1042-1043 (9th Cir. 1999), the defendant might advance a claim that the government had failed to fulfill a promise it made; such a claim would be analyzed under due process cases such as *Doyle* v. *Ohio*, 426 U.S. 610 (1976), as well as under the voluntariness test.

C. Developments In The Law That Have Affected The Validity Of The Past Precedent

1. Perhaps the feature of *Miranda* that has raised the greatest doctrinal doubt about that decision's validity is the tension that has emerged in this Court's cases that followed the *Miranda* decision itself. The Court has consistently premised those decisions on the proposition that *Miranda*'s holding requires the suppression of unwarned statements in the government's case-in-chief in state and federal cases. The one exception is the Court's holding in *New York* v. *Quarles*, 467 U.S. 649 (1984), recognizing a "public safety" exception to *Miranda*. But that case did not question the general rule against the use of unwarned statements in the government's case-in-chief, which the Court restated the following year in *Oregon* v. *Elstad*, 470 U.S. at 306-307.[29] The Court has never suggested that the core holding of *Miranda* should be overruled. Indeed, if this Court were to overrule *Miranda*, it would not only have to disavow the line of its cases that have addressed the *Miranda* rule, but would also have to overrule directly at least eleven cases that have reaffirmed that a confession obtained in violation of *Miranda* must be suppressed in the government's case-in-chief.[30]

---

[29] *Elstad* made this crystal clear: "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. * * * The Court today in no way retreats from the bright-line rule of *Miranda*." 470 U.S. at 317.

[30] *Thompson* v. *Keohane*, 516 U.S. 99 (1995); *Withrow* v. *Williams*, 507 U.S. 680 (1993); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990); *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990); *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Berkemer* v. *McCarty*, 468 U.S. 420 (1984); *Smith* v. *Illinois*, 469 U.S. 91 (1984) (per curiam); *Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Estelle* v. *Smith*, 451 U.S. 454 (1981); *Orozco* v. *Texas*, 394 U.S. 324 (1969); *Mathis* v. *United States*, 391 U.S. 1 (1968).

The Court's decision in *Quarles* and its holdings limiting the application of *Miranda*'s suppression rule outside the government's case-in-chief, however, have led some observers to conclude that *Miranda* has lost its character as a rule that protects constitutional rights. The Court's decisions in *Tucker* and later cases rest on the conclusion that the procedural safeguards articulated in *Miranda* are not themselves required by the Constitution and that a violation of *Miranda*'s prophylactic rules does not necessarily produce statements that are themselves "compelled." That reasoning is the foundation of the public-safety exception and of this Court's holdings that unwarned, but voluntary, statements may be used for impeachment and for the acquisition of derivative evidence that may be admitted at trial.[31] Since the Court has said that a *Miranda* violation does not necessarily involve a violation of the Constitution, the question arises whether this Court has properly determined to apply a suppression remedy in the government's case-in-chief in all prosecutions, federal and state, for the violation of judicially imposed prophylactic rules.

2. In our judgment, the Court's statements that *Miranda*'s "prophylactic" requirements sweep more broadly than does the Self-Incrimination Clause itself do not invalidate *Miranda*'s status as a Fifth Amendment decision. It is worth recalling that this Court adopted the procedural safeguards of *Miranda* only after more than thirty years of applying a case-by-case voluntariness test. That judicial experience led the Court to conclude that Fifth Amendment rights in the setting of custodial interrogation could not adequately be protected through case-specific adjudication

[31] In contrast, statements "compelled" under a grant of immunity may generally not be used, consistent with the Fifth Amendment, either for impeachment, see *New Jersey* v. *Portash*, 440 U.S. 450, 458-459 (1979), or for the acquisition of derivative evidence that may be introduced against the defendant, see *Kastigar* v. *United States*, 406 U.S. 441 (1972).

of claims of police coercion, and that procedural safeguards were required. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. at 515 ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.").[32] The objective of the *Miranda* safeguards "is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of the suspect's Fifth Amendment rights." *Moran* v. *Burbine*, 475 U.S. at 425.

[32] *Blackburn* v. *Alabama*, 361 U.S. 199, 207 (1960) ("[A] complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."); *Spano* v. *New York*, 360 U.S. 315, 321 (1959) ("[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."); *Haley* v. *Ohio*, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring in the judgment) ("Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory, but such as they are we must apply them."); *id.* at 606 ("Unhappily we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured.").

The Court has explained the balance struck in *Miranda* as follows:

> Custodial interrogations implicate two competing concerns. On the one hand, the need for police questioning as a tool for effective enforcement of criminal laws cannot be doubted. Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is inherently coercive and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

Moran, 475 U.S. at 426-427 (citations and internal quotation marks omitted). *Miranda* thereby serves individual and systemic interests in safeguarding Fifth Amendment rights. Although "[b]oth waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system, * * * neither admissions nor waivers are effective unless there are

both particular and systemic assurances that the coercive pressures of custody were not the inducing cause." *Minnick* v. *Mississippi*, 498 U.S. at 155.

3. The Court has explained not only the need for safeguards in custodial interrogation, but also how *Miranda*'s status as a prophylactic rule is linked to the constitutional provision on which it is based. In *Oregon* v. *Elstad*, the Court explained that the "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion [that is] * * * irrebuttable for purposes of the prosecution's case in chief." 470 U.S. at 307. Because a confession obtained in violation of *Miranda* is subject to an "irrebuttable presumption of compulsion" in the prosecution's case-in-chief, the suppression of confessions in that context is consistent with the Self-Incrimination Clause's requirement that a person not be "compelled" to be a witness against himself. The conclusive presumption is a rule of law that the Court applies to serve systemic goals in protecting Fifth Amendment rights. See *Elstad*, 470 U.S. at 307 n.1 ("A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements [in the government's case-in-chief].") (emphasis in original).

The Court in *Elstad* also explained that, outside the government's case-in-chief, a confession obtained in violation of *Miranda* is subject only to a rebuttable presumption of compulsion. Accordingly, it may be permissible to use an unwarned confession for impeachment or to obtain evidence. 470 U.S. at 307 ("But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."). The rule in those settings thus permits use of the unwarned confession so long as the presumption of compulsion is overcome by a showing under the totality of the circumstances that the statement was

made voluntarily. *Ibid.*; see *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972).

4. There are other contexts in which this Court similarly has recognized prophylactic rules that are designed to safeguard constitutional rights, even when those rules may in particular cases sweep more broadly than the constitutional right upon which they are based. For example, in *Douglas* v. *California*, 372 U.S. 353 (1963), this Court held that States must provide appointed counsel to indigent criminal defendants on appeal. Subsequently, in *Anders* v. *California*, 386 U.S. 738 (1967), the Court set forth a procedure to be used by appellate counsel representing an indigent defendant when counsel concludes that there is no non-frivolous ground for appeal and he wishes to withdraw from representation. The *Anders* procedure, however, "is not 'an independent constitutional command,'" but "'a prophylactic framework' * * * established to vindicate the constitutional right to appellate counsel." *Smith* v. *Robbins*, No. 98-1037 (Jan. 19, 2000), slip op. at 10 (quoting *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987)). The Court has recently reaffirmed that some such prophylactic procedure is necessary. In *Smith*, the Court explained that "the States are free to adopt different procedures [from those outlined in *Anders*], so long as those procedures adequately safeguard a defendant's right to appellate counsel." Slip op. 2; see also *id.* at 15 ("In determining whether a particular state procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve—to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required by *Douglas*, and also to enable the State to protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.") (internal quotation marks omitted).

Similarly, in *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986), the Court held that, once a defendant has invoked his Sixth Amendment right to counsel at an arraignment or

similar proceeding, "any waiver of the defendant's right to counsel for * * * police-initiated interrogation is invalid." In *Michigan* v. *Harvey*, 494 U.S. 344 (1990), however, the Court held that such invalidity requires suppression of a confession obtained in violation of *Jackson* only in the prosecution's case-in-chief, but not when it is offered for impeachment. The Court explained that distinction on the ground that *Jackson* is "not compelled directly by the Constitution," 494 U.S. at 351-352, but sets forth a "prophylactic rule," *id.* at 345, 346, 349, 351, 353, "designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel," *id.* at 351. The Court acknowledged in *Harvey* that the rationale of this line of Sixth Amendment decisions is based on the rationale underlying *Miranda*. See 494 U.S. at 349- 352.[33]

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that an increased sentence imposed on a defendant after a successful appeal and reconviction is presumed to be the product of vindictiveness and therefore unconstitutional unless non-vindictive reasons for the increased sentence appear on the record. The Court has explained that *Pearce* is a "prophylactic rule" and has noted the similarities between the "prophylactic rules" in *Pearce* and *Miranda*.

---

[33] Another example of a prophylactic rule is the Confrontation Clause doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968), which forbids the admission of a nontestifying co-defendant's confession in a joint trial, even with a limiting instruction. The purpose of the *Bruton* rule is to avoid the risk that the jury will disregard its instructions. See *Gray* v. *Maryland*, 523 U.S. 185, 189, 192, 197 (1998) (referring to "protective rule" of *Bruton*). Although some juries might be able to follow a limiting instruction, the Court concluded that the risk that many could not do so warranted a conclusion that the Confrontation Clause itself protects the defendant against the latter possibility. But in a situation in which competing values outweigh that risk, the co-defendant's confession may be used. See *Tennessee* v. *Street*, 471 U.S. 409 (1985) (confession that is inadmissible under *Bruton* rule is admissible for impeachment).

Michigan v. *Payne*, 412 U.S. 47, 53-54 (1973); see also *Wasman* v. *United States*, 468 U.S. 559, 562-563 (1984); *United States* v. *Goodwin*, 457 U.S. 368, 372-377 (1982); *Colten* v. *Kentucky*, 407 U.S. 104, 116 (1972). The Court reached a similar conclusion in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), holding that a State may not respond to a defendant's attempt to seek a trial *de novo* in a higher tier of a two-tier court system by charging the defendant with a more serious offense. The Court has recognized that the rules announced in *Pearce* and *Blackledge*, like the rules in *Miranda* and *Jackson*, require a decision in favor of the defendant in some cases even though the underlying constitutional right being protected may not have been shown to have been violated in a particular case.[34] But the Court determined that such rules were necessary to provide full effectuation of constitutional rights.[35]

Our point is not that such rules are always correct, or that prophylactic rules that lead to the suppression of evidence in a criminal case are often justified. In most criminal settings, the heavy costs of such rules would not outweigh the potential marginal protection they offer for the underlying

---

[34] See *Blackledge*, 417 U.S. at 28 (applying the rule notwithstanding that there was "no evidence that the prosecutor in this case acted in bad faith or maliciously"); *Payne*, 412 U.S. at 54 (noting that *Pearce* adopted presumption of vindictiveness notwithstanding that "nothing in *Pearce* intimates that the Court regarded [judicial vindictiveness] as anything more than an infrequently appearing blemish on the sentencing process").

[35] The Court has also adopted constitutional prophylactic rules to safeguard constitutional rights in a variety of other settings. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974) (explaining that, even though "there is no constitutional value in false statements of fact," the Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny nevertheless "extended a measure of strategic protection to defamatory falsehood" in cases involving public officials and public figures); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (setting forth "procedural safeguards designed to obviate the dangers of a censorship system" with respect to motion picture obscenity).

constitutional right. Ordinarily, therefore, this Court requires proof of an individualized constitutional harm before framing a remedy. See, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). That does not, however, deprive the *Miranda* rules, or other constitutional prophylactic rules, of their constitutional status. Prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication. *Miranda* is distinctive in the detail with which the Court specified particular procedural safeguards. But *Miranda*'s adoption of a prophylactic rule—which has since been applied where necessary but not, as *Tucker*, *Quarles*, and *Elstad* show, in categories of cases where its adverse effects would outweigh any benefits—does not uniquely depart from the Court's constitutional jurisprudence.

D. *Change In Factual Premises*

There appear to be at least two key factual assumptions underlying *Miranda*. First, "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures." 384 U.S. at 467. Second, "without proper safeguards"—provided by the administration of the *Miranda* warnings or a fully effective equivalent—there is a great risk that those pressures may "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Ibid.* Debate concerning each of those premises is possible, as it was at the time *Miranda* was decided. The inquiry for purposes of stare decisis, however, focuses on changes in circumstance, because the rule of stare decisis would provide little stability if the factual premises of previous decisions were constantly subject to reconsideration, even when the evidence showed no change of circumstance. We cannot conclude that the passage of time or other developments in our society have

substantially altered the validity of either of the key factual premises on which *Miranda* was based.[36]

The Court's perception of custodial interrogation as inherently coercive was based on the Court's prior "voluntariness" cases and its review of police interrogation manuals. See *Miranda*, 384 U.S. at 445-456. The Court's conclusion was not driven solely by cases of physical abuse; to the contrary, the Court "stress[ed] that the modern practice of in-custody interrogation is psychologically rather than physically oriented." *Id.* at 448. Custodial interrogation is an important and necessary procedure of law enforcement, and law enforcement agents today are generally better trained than they were in 1966. It cannot be said, however, that the interrogation process is so uniformly different now than at the time of *Miranda* that changes have undercut the validity of that decision.

Likewise, the Court's view that warnings (or other safeguards) would be an effective antidote to the coercive pressures of custodial interrogation has not been undercut by changed circumstances. Some modern technologies—videotaping, for example—could offer promise in documenting that a particular confession was not produced by any coercion inherent in the custodial setting. But no assurance currently exists that such technological substitutes could provide a suitable replacement for the by-now well-understood *Miranda* warnings on a large-scale basis, and in any event the statute at issue in this case does not present the

[36] In a companion federal case decided with *Miranda*, the United States argued that, in deciding whether a suspect's statements during in-custody questioning were the product of compulsion, the Court should require consideration of the totality of the circumstances, rather than adopting a constitutional rule turning on the presence or absence of warnings. Brief for the United States at 28-38, *Westover* v. *United States*, 383 U.S. 903 (1966) (No. 761). The calculus of whether to retain *Miranda*'s rule with respect to unwarned statements, thirty-four years after the Court announced it, presents very different considerations.

question whether such a technological fix could form part of an adequate substitute for the *Miranda* warnings. See pp. 13-20, *supra*. Nor does the widespread public familiarity with the *Miranda* warnings suggest that they are no longer necessary. Not all members of our society are conversant with their rights. And, if *Miranda* were overruled, it is difficult to predict how long even general public familiarity would persist.[37] Finally, even if a suspect held in custody already knows of his rights, the Court in *Miranda* concluded that the provision of warnings in each case "show[s] the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S. at 468. Once again, there is no basis for a conclusion that changed circumstances or a changed perception of the facts warrants reassessment of that view.

* * * * *

In considering whether the Court should revisit *Miranda*, it is appropriate to make an observation that transcends the usual factors considered under the rubric of stare decisis. In our view, *Miranda* has come to play a unique and important role in the nation's conception of our criminal justice system: it promotes public confidence that the criminal justice system is fair. Overruling *Miranda*—at this juncture, more than three decades after it was announced and after law enforcement has accommodated to its basic requirements—would thus tend to undermine public confidence in the fairness of that system. The law enforcement system depends on citizen cooperation and support in myriad ways. Steps that may damage that confidence should not be taken lightly.

[37] Federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of *Miranda*. We are unable to predict whether state and local law enforcement would do so. More to the point here, there would be no basis for the Court to draw a firm conclusion about what practices would ensue were it to overrule *Miranda*.

There is no doubt that the public pays a heavy price if technical violations of *Miranda* result in suppression of otherwise probative evidence, and non-prosecution or acquittal of felons ensues. But there are concrete benefits of *Miranda* as well: it establishes clear guidelines of conduct for agents; it facilitates the admission in evidence of confessions that follow administration of the warnings; it bolsters the credibility of such confessions in the eyes of jurors; and it generally contributes to the perceived fairness of the criminal justice system. The stability of this Court's constitutional jurisprudence is also of surpassing importance to the system of justice. Especially in light of those factors, we do not urge the Court that *Miranda* be overruled.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

JANET RENO
Attorney General
SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JAMES A. FELDMAN
LISA S. BLATT
Assistants to the Solicitor General

JANUARY 2000

APPENDIX

1. The Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself."

2. Section 3501 of Title 18 provides as follows:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the abovementioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other official empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other official beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

FOR ARGUMENT
Apr 10 2000

Supreme Court, U.S.
FILED
APR 10 2000

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

JANET RENO
Attorney General

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

		Page
I.	Congress may not "overrule" *Miranda* by reinstating a pure voluntariness test	2
	A. *Miranda* and the States	2
	B. *Miranda* and the Constitution	4
	C. A plenary congressional power to overrule *Miranda* has no case law support	8
II.	Section 3501 impermissibly returns the law to its pre-*Miranda* state	11
III.	The showing required to overrule *Miranda* has not been made	14
	A. The proportionality of *Miranda*	14
	B. The costs and benefits of *Miranda*	16
Appendix		1a

TABLE OF AUTHORITIES

Cases:

Anders v. *California*, 386 U.S. 738 (1967)	7
Arizona v. *Roberson*, 486 U.S. 675 (1988)	16
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964)	10
Barker v. *Wingo*, 407 U.S. 514 (1972)	3
Bivens v. *Six Unknown Agents*, 403 U.S. 388 (1971)	8, 13
Bush v. *Lucas*, 462 U.S. 367 (1983)	9
Carter v. *Kentucky*, 450 U.S. 288 (1981)	3
Cicenia v. *Lagay*, 357 U.S. 504 (1958)	3
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	9, 14, 16
Colorado v. *Spring*, 479 U.S. 564 (1987)	11, 16
Davis v. *United States*, 512 U.S. 452 (1994)	19
Doyle v. *Ohio*, 426 U.S. 610 (1976)	3
Edwards v. *Arizona*, 451 U.S. 477 (1981)	16
First Nat'l City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972)	10

Cases—Continued: Page

Gallegos v. *Nebraska*, 342 U.S. 55 (1951) 3
Garner v. *United States*, 424 U.S. 648 (1976) 15
Harris v. *New York*, 401 U.S. 222 (1971) 6
Harris v. *Rivera*, 454 U.S. 339 (1981) 3
Kimel v. *Florida Bd. of Regents*, 120 S. Ct. 631 (2000) 14
Lego v. *Twomey*, 404 U.S. 477 (1972) 14
Mapp v. *Ohio*, 367 U.S. 643 (1961) 9
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 9
McNabb v. *United States*, 318 U.S. 332 (1943) 3
Michigan v. *Tucker*, 417 U.S. 433 (1974) 5, 7, 16
Miller v. *Fenton*, 474 U.S. 104 (1985) 7
Minnick v. *Mississippi*, 498 U.S. 146 (1990) 5, 16
Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... *passim*
Monroe v. *Pape*, 365 U.S. 167 (1961) 13
Moran v. *Burbine*, 475 U.S. 412 (1986) 6, 15, 16
Mu'Min v. *Virginia*, 500 U.S. 415 (1991) 2
New York v. *Quarles*, 467 U.S. 649 (1984) 4, 6
Oregon v. *Elstad*, 470 U.S. 298 (1985) 4, 6
Oregon v. *Hass*, 420 U.S. 714 (1975) 6
Pennsylvania v. *Muniz*, 496 U.S. 582 (1990) 15
Reck v. *Pate*, 367 U.S. 433 (1961) 11, 12
Rhode Island v. *Innis*, 446 U.S. 291 (1980) 2
Smith v. *Phillips*, 455 U.S. 209 (1982) 3
Smith v. *Robbins*, 120 S. Ct. 746 (2000) 7, 8, 15
South-Central Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984) 10-11
Strickland v. *Washington*, 466 U.S. 668 (1984) 8
Townsend v. *Burke*, 334 U.S. 736 (1948) 3
United States v. *Janis*, 428 U.S. 433 (1976) 16
United States v. *Leon*, 468 U.S. 897 (1984) 9
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 13
Victor v. *Nebraska*, 511 U.S. 1 (1994) 3
Williams v. *United States*, 341 U.S. 97 (1951) 13
Withrow v. *Williams*, 507 U.S. 680 (1993) 3-4, 8

Constitution and statutes: Page

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 10, 11
Art. VI, Cl. 2 (Supremacy Clause) 5
Amend. IV 9
Amend. V (Self-Incrimination Clause) ..... *passim*
Amend. XIV, § 5 14
Federal Tort Claims Act, 28 U.S.C. 2680(h) 13
18 U.S.C. 241 13
18 U.S.C. 242 13
18 U.S.C. 3501 ..... *passim*
18 U.S.C. 3501(a) 11
18 U.S.C. 3501(b) 11, 12
28 U.S.C. 530B 13
28 U.S.C. 1331 9
28 U.S.C. 2254(a) 4
42 U.S.C. 1983 13

Miscellaneous:

ABA Special Comm. on Crim. Justice in a Free Society, *Criminal Justice in Crisis* (1988) 17
P. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996) 18
Y. Kamisar, *Can (Did) Congress Overrule* Miranda?, 85 Cornell L. Rev. 883 (2000) 16
2 W. LaFave & J. Israel, *Criminal Procedure* (1999) 5
T. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985) 8
H. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 16
S. Saltzburg & D. Capra, *American Criminal Procedure: Cases and Comentary* (5th ed. 1996) 5
L. Yackle, *Post Conviction Remedies* (1981) 4

The centerpiece of the argument in support of the judgment is the assertion that the *Miranda* doctrine is non-constitutional in character, so that Congress was free to supersede this Court's holdings with a statute that restores the due process "voluntariness" inquiry. Brief of Court-Appointed Amicus Curiae Paul G. Cassell 4-28. As we show below, that proposition is untenable. In the alternative, amicus argues (Br. 28-48) that, despite Congress's manifest intention to turn the clock back and restore the voluntariness test in 18 U.S.C. 3501, that statute and a variety of unrelated provisions do not return the law to its pre-*Miranda* state, but in fact provide adequate additional safeguards for Fifth Amendment rights; and, if that is not so, *Miranda* should be reconsidered and rejected.

None of those propositions is sound. This Court's consistent application of *Miranda* to the States over the past 34 years establishes its constitutional character, such that it is not subject to plenary revision and overruling by Congress. The purpose and effect of Section 3501 is not to provide substitutes for the *Miranda* safeguards, but to reject the need for any such safeguards. And the burden required to justify the overruling of *Miranda*, and to return litigation over confessions wholly to the voluntariness test that this Court found inadequate 34 years ago, is a heavy one, and it has not been met in this case.

Miranda rests on the proposition that, in the distinctive context of custodial interrogation, systemically adequate safeguards are required to protect a suspect's rights under the Self-Incrimination Clause. *Miranda* warnings are not the only permissible safeguards, this Court has made clear, but some safeguards must exist. Section 3501 rejects that premise. That premise, however, has long been a central principle of the Court's constitutional criminal jurisprudence, and we do not find justification to urge this Court to overrule its precedents that have stood for 34 years. As Chief Justice Burger explained in 1980, "[t]he meaning of *Miranda* has

become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (Burger, C.J., concurring).

I. CONGRESS MAY NOT "OVERRULE" *MIRANDA* BY REINSTATING A PURE VOLUNTARINESS TEST

Amicus contends (Br. 4-28) that this Court need not formally overrule *Miranda* in order to uphold Section 3501 because *Miranda* is defeasible by Congress at will. That contention cannot be reconciled with this Court's practices in applying *Miranda* or with bedrock principles of criminal procedure.

A. *Miranda* And The States

Amicus seeks to reconcile this Court's consistent application of *Miranda* to the States with his view that *Miranda* is a "nonconstitutional measure[]" (Br. 17) by positing that this Court has power, in the absence of contrary legislation, to impose rules on the States that are not constitutionally required. Amicus's theory is fundamentally inconsistent with this Court's holdings on its role in reviewing state convictions.

1. *Review of state convictions.* Because this Court's authority in state cases "is limited to enforcing the commands of the United States Constitution," *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991), the Court could not have applied *Miranda* to the States during the past 34 years without concluding that the Constitution required such application.

Amicus takes issue (Br. 18 n.12) with this Court's statement in *Mu'Min*. He asserts instead (Br. 17) that, in the absence of contrary legislation, "the Court has some authority to impose on the states nonconstitutional measures designed to protect constitutional rights," and that this premise is "at the heart of [amicus's] explanation of the legal basis of *Miranda*." In amicus's view, because *Miranda*'s exclusionary rule "is not a requirement of the Fifth Amendment" (Br. 10), it follows that Congress has the authority to "modify" it (Br. 12). By "modify," amicus apparently means

"eliminate": in his view, Congress may abrogate *Miranda*'s holding and mandate that voluntariness alone is the only prerequisite for admissibility. Nothing in this Court's cases supports that view of Congress's power over rules that this Court has applied to the States.

In order to uphold Section 3501 on the theory that *Miranda* is a "nonconstitutional measure" that is defeasible at the will of Congress, this Court would have to repudiate core principles governing its review of state criminal cases. This Court has frequently been guided by the proposition that it "do[es] not establish procedural rules for the States, except when mandated by the Constitution." *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972); accord *Victor* v. *Nebraska*, 511 U.S. 1, 17 (1994) ("[W]e have no supervisory power over the state courts.").[1] The principle that the Court may not reverse state court decisions except for violations of the Constitution or a federal statute is one that Members of the Court have recognized to be "obvious." See *Carter* v. *Kentucky*, 450 U.S. 288, 307-308 (1981) (Rehnquist, J., dissenting) ("[S]ince the result of the Court's decision is to reverse the judgment of the Supreme Court of Kentucky, the decision must obviously rest upon the fact that the decision of that court is inconsistent with the United States Constitution."). To accept amicus's theory of *Miranda*'s application to the States would not only contradict that principle; it would vastly enlarge this Court's power to reverse state convictions based on rules that are not constitutionally compelled.

2. *Application on habeas corpus.* This Court's recent application of *Miranda* on habeas corpus also conflicts with amicus's view that *Miranda* is common law rather than constitutional doctrine. In *Withrow* v. *Williams*, 507 U.S. 680,

---

[1] See also *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982); *Harris* v. *Rivera*, 454 U.S. 339, 344-345 (1981) (per curiam)); *Doyle* v. *Ohio*, 426 U.S. 610, 617 n.8 (1976); *Cicenia* v. *Lagay*, 357 U.S. 504, 508-509 (1958); *Gallegos* v. *Nebraska*, 342 U.S. 55, 63-64 (1951) (plurality); *Townsend* v. *Burke*, 334 U.S. 736, 738 (1948); *McNabb* v. *United States*, 318 U.S. 332, 340 (1943).

690 (1993), the Court fully acknowledged *Miranda*'s "prophylactic" character, yet concluded that "in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental *trial* right." *Id.* at 691 (internal quotation marks omitted); see *id.* at 689 (describing *Miranda*'s "now-familiar measures in aid of a defendant's Fifth Amendment privilege"); *id.* at 692 (discussing "the Fifth Amendment 'trial right' protected by *Miranda*"). The Court nowhere suggested that it regarded *Miranda* as one of the "laws of the United States" that may be enforceable on habeas corpus. 28 U.S.C. 2254(a).[2]

B. *Miranda* And The Constitution

Amicus offers his radical theory to explain this Court's application of *Miranda* to the States because he concludes that this Court's later cases have stripped *Miranda* of a constitutional basis. See Br. 28 (*Miranda* is an "extraconstitutional" rule). Relying on this Court's statements that the *Miranda* rules are "not themselves rights protected by the Constitution," *New York* v. *Quarles*, 467 U.S. 649, 654 (1984), and that they "sweep[] more broadly than the Fifth Amendment itself," *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985), amicus contends (Br. 4-9) that the *Miranda* doctrine cannot be constitutionally based, and, accordingly, Congress is free to require the admission of unwarned confessions without providing any substitute protective framework. Amicus misunderstands the source and nature of *Miranda*.[3]

---

[2] As authority for the view that application of *Miranda* on habeas implements the "laws of the United States," amicus cites (Br. 21-22), a treatise by Professor Yackle. In fact, however, Professor Yackle principally maintains that *Miranda* violations are cognizable on federal habeas, because to hold otherwise would be to "eliminate" the "substantive [constitutional] right[], not merely [a] judge-made remed[y], * * * from the scope of habeas corpus." L. Yackle, *Post Conviction Remedies* § 96, at 370 (1981).

[3] Amicus's defense of Section 3501 would also leave intact *Miranda*'s application to the States. A theory that imposes *Miranda* on the States but not on the federal government has no constitutional coherence. Perhaps amicus would posit that States too could opt out of *Miranda* by enacting the voluntariness test, but that theory violates the Supremacy Clause: a State may not nullify federal law.

Miranda responded to this Court's conclusion—after 30 years of grappling with the due process voluntariness test on a case-by-case basis—that additional protections, above and beyond the totality-of-the-circumstances test, are required to provide safeguards in view of the coercive pressures of custodial interrogation.[4] The Court thus crafted a prophylactic framework to provide systemic protection for rights guaranteed by the Self-Incrimination Clause. See *Michigan* v. *Tucker*, 417 U.S. 433, 443-444 (1974). As this Court has since explained:

> Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that *neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause.*

Minnick v. *Mississippi*, 498 U.S. 146, 155 (1990) (emphasis added). Far from concluding that developments since *Miranda* have deprived that case of constitutional support, the Court reaffirmed, nearly two decades later, that *Miranda* "strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's

---

[4] Commentators recognize the inability of the "totality" test, standing alone, to secure the constitutional rights at stake. See, *e.g.*, 2 W. LaFave & J. Israel, *Criminal Procedure* § 6.2(d), at 467 (1999) (noting the Court's failure to "articulate a clear and predictable definition of voluntariness"); S. Saltzburg & D. Capra, *American Criminal Procedure: Cases and Commentary* 514 (5th ed. 1996) ("The word 'voluntary' hardly offered clear guidance to law enforcement officers and to lower court judges. It had to be defined anew in every case. * * * In fact, each [of the Supreme Court's] totality of the circumstances decision[s], it might be argued, caused a greater division among lower trial and appellate courts."); see also U.S. Br. 40-41 & n.32 (discussing pre-*Miranda* cases).

Fifth Amendment rights." *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986); see also *Elstad*, 470 U.S. at 317 (the Court "in no way retreats from the bright-line rule of *Miranda*").

The Court's recognition that *Miranda* warnings are not, in all circumstances, required to satisfy the Constitution (see Amicus Br. 7-8) in no way undermines the proposition that the *Miranda* framework rests on this Court's authority to interpret and apply the Constitution. Indeed, it is precisely because the *Miranda* cases create a prophylactic framework that this Court may shape the governing legal rules, applying the *Miranda* doctrine where its purposes are best served and declining to do so where its purposes would be less well-served or where it would impose special or unusual costs. This Court has done so by, among other things, permitting the use of unwarned statements for impeachment, see *Harris* v. *New York*, 401 U.S. 222, 224 (1971); *Oregon* v. *Hass*, 420 U.S. 714, 722 (1975), and dispensing with the warnings where public safety so requires, *Quarles*, 467 U.S. at 651. Sustaining *Miranda*, however, would hardly require overruling *Quarles*, *Harris*, and *Hass*, among other cases. See Amicus Br. 8-9 & nn.4-5. This Court's *Miranda* cases have held that the Constitution generally requires a set of procedural safeguards that serve systemic values, but the Court has also recognized that such safeguards need not be imposed inflexibly and without regard to competing concerns.[5]

---

[5] Amicus finds (Br. 6-7) this Court's statements that the *Miranda* safeguards are not themselves constitutional rights to be irreconcilable with a conclusion that *Miranda* has a "constitutional basis." In *Elstad*, however, the Court explained that "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." 470 U.S. at 317. That presumption explains how unwarned statements can be excluded from evidence consistent with the Fifth Amendment's text that a defendant may not be "compelled * * * to be a witness against himself." The *Miranda* conclusive presumption is a legal rule, but that does not distinguish it from voluntariness determinations. The "totality of the circumstances" test also resolves a question of *law* about the permissible "techniques for extracting the statements"; it is not a question of historical fact. *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985).

Nor is *Miranda* invalidated by the Court's conclusion (384 U.S. at 467) that *either* the *Miranda* rules *or* some equally adequate alternative is necessary to protect the Fifth Amendment privilege. See Amicus Br. 6-7, 11-12. In that respect, *Miranda* is supported, rather than undercut, by *Smith* v. *Robbins*, 120 S. Ct. 746 (2000). *Robbins* explained that the procedure outlined in *Anders* v. *California*, 386 U.S. 738 (1967), for the withdrawal of court-appointed appellate counsel who views his client's claims as frivolous was not "an independent constitutional command" but instead constituted "'a prophylactic framework' that we established to vindicate the constitutional right to appellate counsel." 120 S. Ct. at 757. The decision in *Anders*, the Court noted in *Robbins*, "simply erect[ed] 'safeguards.'" *Ibid.*[6] *Robbins* thus held that, when counsel for an indigent defendant concludes that the appeal is frivolous and seeks to withdraw, States must have "procedures [that] adequately safeguard a defendant's right to appellate counsel." *Id.* at 753; see also *id.* at 760. Yet the Court also made clear that no single set of procedures is required—the test is whether a particular procedure "reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 759.[7] Finally, *Robbins* held that, even where a State provides adequate procedures for assuring that appointed counsel will not improperly withdraw, a defendant may still

---

[6] This Court's description of *Miranda* is to the same effect: *Miranda* provided a set of "procedural safeguards" that are "prophylactic" in character. *Michigan* v. *Tucker*, 417 U.S. at 444, 446.

[7] *Miranda* similarly contemplated legislative alternatives: "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process. * * * We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." 384 U.S. at 467.

claim that he was deprived of the underlying constitutional right to counsel, under the test of *Strickland* v. *Washington*, 466 U.S. 668 (1984). 120 S. Ct. at 763-764.[8]

In all of those respects, *Robbins*'s constitutional analysis runs parallel to *Miranda*: in both settings, a prophylactic set of procedures is required to protect rights; a legislature may experiment with alternative procedures, subject to this Court's review for adequacy; but a legislature may not simply eliminate *all* such procedures in favor of correcting actual violations on a case-by-case basis. Whether or not rules such as *Miranda* and *Anders* are properly described as "constitutional common law" (Amicus Br. 10 n.7), they "cannot be overturned by mere congressional disapproval. * * * Congress may override preemptive lawmaking based on the Constitution, but only if the federal courts independently conclude that Congress has enacted a statute that provides roughly the same degree of protection for constitutional policies as the federal common law rule." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 57-58 (1985).

C. A Plenary Congressional Power To Overrule *Miranda* Has No Case Law Support

Amicus seeks support for his theory of congressional power to modify or overrule this Court's constitutional holdings in several other branches of this Court's jurisprudence. None of those lines of cases assists him.

1. *Bivens.* In *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971), this Court, exercising the traditional authority of courts "to adjust their remedies so as to grant the necessary relief," *id.* at 392, recognized a cause of action for damages

[8] *Miranda* has the same feature: even when the warnings have been given, the suspect may still raise a claim that subsequent statements were involuntary under the totality-of-the-circumstances test. See *Withrow* v. *Williams*, 507 U.S. at 693-694. In practice, however, once a defendant waives his rights after adequate warnings, the voluntariness claim is virtually sure to fail. See U.S. Br. 36-38.

against federal officials for the violation of Fourth Amendment rights. The Court drew on the judicial power, authorized in the grant of general federal question jurisdiction in 28 U.S.C. 1331: "In the absence of * * * a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal." *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983).

The Court has held that Congress may displace *Bivens* actions, at least when it provides "constitutionally adequate" alternatives. *Bush*, 462 U.S. at 378 n.14. Assuming that Congress may completely eliminate a *Bivens* remedy in a particular context (a question the Court has reserved), *Bivens* does not furnish an analogy to *Miranda*. *Bivens* was not based on a constitutional requirement deriving from the Fourth Amendment, but on the Court's traditional authority under Section 1331 to imply a cause of action for damages in federal court to remedy a completed violation of law. Congressional power over the implication of such federal causes of action for damages has always been recognized as plenary. By contrast, *Miranda* and the cases following it are based on the proposition that the Self-Incrimination Clause requires safeguards to prevent violations in the distinctive context of custodial interrogation. Plenary congressional authority over whether the Constitution requires safeguards would be inconsistent with this Court's cases from *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), to *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[9]

[9] Amicus also cites *Mapp* v. *Ohio*, 367 U.S. 643 (1961), to exemplify his view that this Court has "authority to improvise measures to assist in the protection of constitutional rights where neither the Constitution nor the legislature has specified a particular mechanism for protecting those rights." Br. 10. He does not expressly assert that Congress could, without providing an adequate alternative, simply eliminate the exclusionary rule. But, because the exclusionary rule is not a "personal constitutional right" of the defendant, *United States* v. *Leon*, 468 U.S. 897, 906 (1984), amicus's theory about *Miranda* necessarily implies that result. In effect,

2. *Act of State and Commerce Clause Cases.* Amicus asserts that in cases applying the Act of State doctrine, the Court has recognized its authority to a craft a rule applicable to the States that is "subject to revision and restriction by Congress as a judicially developed, nonconstitutional rule, even while the Court's authority to craft it in the first instance is not seriously in doubt." Br. 18; see also Br. 18 n.11. The Act of State doctrine is not comparable to *Miranda*. It recognizes limitations on judicial inquiry into foreign governmental action. The authority of federal courts to adopt such a rule of decision and apply it to the States arises from constitutional grants of authority that "reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions." See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). Because the doctrine protects powers reserved to the federal government, it necessarily binds the States. And because the ultimate constitutional responsibility for foreign affairs resides in the Executive and Legislative Branches, those branches have substantial latitude to modify the otherwise applicable judicial rule. Cf. *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767-768 (1972) (plurality opinion) (addressing authority of Executive Branch to supersede Act of State doctrine). By contrast, *Miranda* does not rely on or protect constitutional grants of authority to the political branches of the federal government. Therefore, those branches have no authority to abrogate this Court's decisions in *Miranda* and its progeny.

The dormant Commerce Clause cases cited by amicus (Br. 18 n.11) are irrelevant for a similar reason: that doctrine derives from and protects the plenary power of *Congress* to regulate commerce. See *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87-88 (1984) (dormant Commerce Clause is "a self-executing limitation on the power of the States," but it is "clear that Congress may redefine the distribution of power over interstate commerce by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible") (Opinion of the Court; internal quotation marks omitted).

amicus would have this Court cede to Congress plenary authority to define the measures that are required to protect constitutional rights.

II. SECTION 3501 IMPERMISSIBLY RETURNS THE LAW TO ITS PRE-*MIRANDA* STATE

Amicus argues (Br. 28) that, even if the Court may require some "prophylaxis" beyond the voluntariness standard, Section 3501, "taken together with the legal landscape that surrounds it, provides more than adequate protection to safeguard suspects from police compulsion." Section 3501, however, was intended to—and does—simply return the law to its pre-*Miranda* state. See U.S. Br. 13-20; J.A. 197. Moreover, there are no changes in the surrounding "legal landscape" that compensate for Section 3501's abrogation of *Miranda*'s core holdings.

1. *Section 3501.* Section 3501 requires a court to admit a confession "if it is voluntarily given," 18 U.S.C. 3501(a), and it directs the court to "take into consideration all the circumstances surrounding the giving of the confession" in determining voluntariness, 18 U.S.C. 3501(b). Section 3501 thereby codifies pre-*Miranda* law, which in virtually identical terms required that "all the circumstances attendant upon the confession must be taken into account" in determining its voluntariness. *Reck* v. *Pate*, 367 U.S. 433, 440 (1961). Amicus does point out (Br. 33) that Section 3501 requires consideration of the defendant's knowledge of "the nature of the offense with which he was charged or * * * suspected," a factor that the Court subsequently concluded is not relevant to the voluntary waiver of Fifth Amendment rights. *Colorado* v. *Spring*, 479 U.S. 564, 577 (1987). Section 3501, however, does not require courts to give specific weight to that (or any other) factor. And to the extent that the defen-

dant's awareness of the charges might be relevant under Section 3501, although irrelevant under the Fifth Amendment, it would not serve any purpose in protecting *constitutional* values. See U.S. Br. 18 n.13.

Amicus also argues (Br. 32) that "[t]he incentives to [give *Miranda* warnings] that Section 3501 provides are much stronger than those in pre-*Miranda* law." He observes (Br. 32) that Section 3501 requires that a court, in determining voluntariness, "shall take into consideration all the circumstances surrounding the giving of the confession, including" whether a suspect "was advised or knew" of his right to remain silent and whether he "had been advised * * * of his right to the assistance of counsel," 18 U.S.C. 3501(b). Before *Miranda*, however, this Court had very frequently adverted to those same factors as important elements in the totality-of-the-circumstances voluntariness test. See U.S. Br. 15-16 nn.10-11 (citing cases). Amicus does not explain how a direction to courts that they "shall" consider all the circumstances, including two particular factors, differs in any significant way from pre-existing law, which required that courts "must" consider all the circumstances, *Reck*, 367 U.S. at 440 including (under this Court's cases) those same two factors.

2. *Other remedies.* Amicus also contends (Br. 34) that, apart from Section 3501, "the legal incentives for non-coercive police questioning today are almost unrecognizably greater than when *Miranda* was decided," and that those incentives, together with Section 3501, create a "constitutionally adequate alternative to the *Miranda* rules," Br. 37. Amicus fails, however, to substantiate that contention.

a. Amicus argues that *Bivens* actions are now available against federal law enforcement authorities, although "[w]hen *Miranda* was written, it was quite difficult as a practical matter to obtain damages in federal court from federal law enforcement officers who violated Fifth Amendment rights." Br. 34. Three of the four consolidated cases decided in this Court's *Miranda* decision were state cases. Damages against

state law enforcement officials for violations of constitutional rights had been recognized since this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), five years before *Miranda*. That remedy did not affect the result in *Miranda* or this Court's later cases. Amicus offers no reason to assign greater weight to that remedy now.

In any event, *Bivens* and Section 1983 actions are of little utility in protecting against "the compulsion inherent in custodial surroundings," 384 U.S. at 458, which is the focus of the *Miranda* rules. While the use of force to obtain a confession may be deterred by the prospect of a damages award under *Bivens* or Section 1983, *Miranda* does not address the use of violence. The subtler coercive pressures addressed by *Miranda* are far less likely to result in damages. Damages would also be rare because, when a confession is excluded from evidence, there would be no Fifth Amendment violation, see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); and when a confession is admitted and the conviction upheld, there would be no sustainable claim.[10]

b. Amicus's reliance (Br. 34-35) on the Federal Tort Claims Act, 28 U.S.C. 2680(h), is also misplaced, since psychological coercion in interrogation would not, standing alone, constitute an "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Ibid.*[11] In short, the remedies noted by amicus cannot make up for Section 3501's overt return to the pre-*Miranda* law governing the voluntariness of a confession.

---

[10] 18 U.S.C. 241 and 242, also cited by amicus (Br. 35), are likewise unhelpful. Those remedies were available before *Miranda*, see *Williams* v. *United States*, 341 U.S. 97 (1951), and provide minimal protection to the Fifth Amendment privilege in the settings relevant in *Miranda* cases.

[11] Amicus also cites (Br. 35 & n.25) 28 U.S.C. 530B, which generally provides that government attorneys are subject to state ethics rules. Section 530B could not influence questioning in the vast majority of custodial interrogations, which are conducted by law enforcement agents without the involvement or direction of government attorneys.

III. THE SHOWING REQUIRED TO OVERRULE *MIRANDA* HAS NOT BEEN MADE

Our opening brief submitted that, applying settled principles of *stare decisis*, there is insufficient justification for overruling *Miranda*. The amici in support of the judgment largely avoid the term "overrule"; they instead request this Court to "modify" *Miranda* by "abandon[ing] the irrebuttable presumption that confessions obtained without compliance with the *Miranda* procedures are always involuntary." Cassell Br. 40. Because the government already bears the burden of establishing the voluntariness of a confession by a preponderance of the evidence, see *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972), adopting a rebuttable presumption is equivalent to overruling *Miranda* outright. That course is not warranted.

A. The Proportionality Of *Miranda*

Amicus argues (Br. 40-48) that *Miranda*'s irrebuttable presumption must be abandoned because it is not "congruent and proportional," see *Boerne*, 521 U.S. at 508, to an underlying constitutional right and is therefore beyond this Court's authority. That conclusion is mistaken.

The underlying point of the "congruence and proportionality" analysis, applied in *Boerne* in analyzing Congress's power under Section 5 of the Fourteenth Amendment, is to inquire whether remedial measures devised by Congress permissibly protect an underlying constitutional right or instead impermissibly redefine the right. See *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644-645 (2000). This Court has never said that such an analysis applies to the Court's own formulation of prophylactic constitutional standards. But, even if it were to do so now, the Court's prior holding that either *Miranda* or some adequate alternative is necessary to effectuate the Self-Incrimination Clause would satisfy that analysis.

Miranda itself extensively analyzed the nature of custodial interrogation, the utility of warnings in promoting a

voluntary decision by the suspect, and the impact on law enforcement of a warnings-and-waiver rule before concluding that such a rule (or an equally effective legislative safeguard) was necessary to protect the privilege. 384 U.S. at 445-491. In later cases, the Court has firmly adhered to the view that "the Court in *Miranda* was impelled to adopt" the irrebuttable presumption, *Garner* v. *United States*, 424 U.S. 648, 657 (1976), and that "protection of the privilege against self-incrimination during pretrial questioning requires application of special 'procedural safeguards,'" *Pennsylvania* v. *Muniz*, 496 U.S. 582, 589 (1990). In *Moran* v. *Burbine*, 475 U.S. at 424, 426-427, the Court reviewed the competing concerns implicated by custodial interrogation and reaffirmed *Miranda* as a "carefully drawn approach."

Amicus suggests (Br. 41-42) that under the "congruence and proportionality" test, a prophylactic rule is justifiable only if it operates where the underlying constitutional norm has been—or likely has been—violated. Amicus is incorrect. This Court has frequently recognized prophylactic rules, but it has never suggested that they must satisfy that standard. See U.S. Br. 44-47. For example, the Court in *Anders* and *Robbins* did not justify the prophylactic rule at issue there (see pp. 7-8, *supra*) by stating that, as an empirical matter, most instances in which appointed appellate counsel unilaterally withdraw involve appeals of arguable merit rather than frivolous appeals. A sensible approach to this Court's prophylactic rules instead considers the importance of the right, the efficacy of competing approaches, and the costs and benefits of a safeguard.[12]

---

[12] The ultimate conclusion on the need for and efficacy of a prophylactic rule to effectuate a constitutional right is not a question of legislative policy or factfinding in this setting any more than it would be in other constitutional contexts. Amicus relies (Br. 26-27) on the 1968 Senate committee report on Section 3501 concluding that *Miranda* harms law enforcement. Although congressional factfinding is entitled to deference, Congress is not free simply to substitute its view for this Court's judgment regarding the ultimate constitutional balance to be drawn. See

B. The Costs And Benefits Of *Miranda*

The amici in support of the judgment believe that the costs of *Miranda*'s exclusionary rule outweigh any of its benefits. *E.g.*, Cassell Br. 46. We do not minimize the costs of excluding probative evidence, either in general or in any particular case. The question whether those costs are justified, however, involves a weighing of competing interests and an assessment of the actual impact of the rule. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433 (1976).

1. *The Exclusionary Rule.* *Miranda* serves at least three purposes. First, it provides procedures to dispel the inherent potential for compulsion in custodial interrogation. See *Moran* v. *Burbine*, 475 U.S. at 425, 426-427. Second, it provides a defined legal standard for the courts in place of the less determinate and more subjective voluntariness inquiry. See *Tucker*, 417 U.S. at 442-443. Third, it provides guidance for the police and prosecutors. *Spring*, 479 U.S. at 577 n.9. It achieves those goals through application of an irrebuttable presumption of compulsion only in the government's case-in-chief, and then only where not overborne by public safety interests. See pp. 4-6, *supra*.

This Court was fully aware in *Miranda* that its holding would preclude the use of some confessions. And the Court has since enforced the doctrine in cases in which the result has been to reverse convictions for serious crimes. See, *e.g.*, *Minnick* v. *Mississippi*, *supra*; *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Accordingly, the observation that *Miranda* violations will foreclose the use of some evidence cannot, standing alone, justify overruling that decision.

While the exclusionary rule does impose certain costs, it also enables this Court to define and enforce legal require-

---

Boerne, 521 U.S. at 519; see also H. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 34 n.176, 42 n.217 (1975); Y. Kamisar, *Can (Did) Congress Overrule* Miranda*?*, 85 Cornell L. Rev. 883, 916-929 (2000) (forthcoming).

ments. By doing so, the Court facilitates the admission of the great number of confessions in which the police comply with *Miranda*. In the absence of such a restraining legal rule, there may be temptation to interrogate suspects without providing *Miranda* warnings, in the hope that a court could subsequently be persuaded that a resulting confession was voluntary. If the courts disagree, prosecutions may be seriously compromised. *Miranda* thus helps to ensure that statements made by suspects in custodial interrogation will ultimately be found admissible at trial.[13] We therefore agree with an American Bar Association committee that concluded that "[a]lthough the *Miranda* decision has sparked heated controversy on a political level, the restrictions it imposes are not considered troublesome by either police or prosecutors." ABA Special Comm. on Crim. Justice in a Free Society, *Criminal Justice in Crisis* 27 (1988). See also *ibid.* ("The Committee finds that *Miranda* does not have a significant impact on law enforcement's ability to solve crime or to prosecute criminals successfully.").[14]

2. *Federal Prosecutions.* With respect to the costs of the *Miranda* rule, our submission is informed by experience in federal prosecutions. Federal courts rarely order the suppression of statements under *Miranda*. Between 1989 and 1999, approximately 720,000 federal prosecutions were brought; during that period, according to the Justice Department's records, federal courts suppressed approximately 78 statements under *Miranda*—*i.e.*, one out of every 9,300 fed-

---

[13] Some amici have pointed out that *Miranda* itself does not always provide a "bright line" test. Certainly, *Miranda* requires application of judgment. But this Court has regularly recognized that *Miranda* provides far better guidance to police and courts than a multi-factor "totality" test, see U.S. Br. 34 n.24, and experience has not suggested otherwise.

[14] We acknowledge that some members of the law enforcement community participating in this case contend that *Miranda* is harmful to law enforcement. With respect, we do not agree that the claimed harms are sufficient to justify overruling of *Miranda*. Other amici in the law enforcement community have filed briefs in agreement with our view.

eral prosecutions.[15] Suppression can impose a cost in a particular case that numbers cannot adequately convey. Nonetheless, the infrequency of suppression under *Miranda* in federal prosecutions weighs against overruling that decision.[16]

Amicus Cassell (Br. 24) states that, "contrary to the impression conveyed in the government's brief [at 34], the actual views of federal law enforcement agencies that have been lodged with the Court reveal serious difficulties with *Miranda*'s exclusionary rule." That is incorrect. In general, the letters we have lodged with the Court conclude that the core mandates of *Miranda* do not hinder law enforcement efforts in any significant way, although certain extensions of *Miranda* have caused some difficulties. U.S. Br. 35. For example, the FBI General Counsel stated that "[t]he FBI has very little difficulty complying with the relatively simple mandates of the *Miranda* decision," although "[p]roblems do occur * * * when those dictates are complicated by the additional protections afforded custodial subjects by [*Edwards*, *Roberson*, and *Minnick*]." The Treasury Department law enforcement agencies reported that they "favor the current legal framework and do not find that the issuance of *Miranda* warnings hinders their investigations," "would not support any modification to current practices," and "would [not] support replacing *Miranda* with the §3501 voluntari-

[15] The figures are reproduced and explained in the Appendix, *infra*.

[16] Amicus has acknowledged that only a "tiny fraction of cases * * * go forward but are later lost because of a *Miranda* suppression motion." P. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387, 394 (1996). In his writings, he has argued instead that the "typical" cost of *Miranda* is the result of "diminishing the confession rate and thus reducing the evidentiary strength of the prosecution's case." *Id.* at 437. That claim is highly debatable. See U.S. Br. 32 n.23. But since amicus now urges (Br. 31, 32 n.23) that under Section 3501 "federal law enforcement officers will almost certainly continue to give [*Miranda* warnings]," replacing *Miranda* with Section 3501 would not increase the number of confessions, and it would therefore do nothing to alleviate what amicus has consistently claimed is *Miranda*'s primary cost to law enforcement.

ness standard."[17] And the DEA reported that it is "unable to cite any incidents in which the requirement to provide *Miranda* warnings to a suspect adversely impacted on a case." Chief Counsel Memorandum (Feb. 22, 2000).[18]

Amicus Cassell asserts (Br. 25) that the Justice Department "has for many years supported the constitutionality of Section 3501." Amicus relies (Br. 25-25) principally on recommendations *to* the Attorney General (which did not result in formal policies) and recollections of certain former Justice Department officials in after-the-fact congressional testimony. Those sources do not express official Justice Department policy. The more telling and indisputable fact is that, "with limited exceptions [Section 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." *Davis* v. *United States*, 512 U.S. 452, 463-464 (1994) (Scalia, J., concurring). That position implies both a rec-

[17] The Acting Chief of the Office of Tax Crimes stated that his office "finds no advantage by either modifying [its] current procedures concerning Miranda or adopting Title 18 U.S.C. §3501." The Commissioner of Customs stated that "I do not believe that the Miranda warnings have compromised Customs officers' ability to question suspects or obtain confessions admissible in court. The clear rule of Miranda provides firm guidance for our officers, and I strongly recommend that it not be changed." And the ATF, through its Assistant Director, reported that "[m]ost agents have grown accustomed to the Miranda process, and it generally does not disturb the progress of many investigations. * * * Section 3501 has the potential to cloud an area of the law that has become second nature to the investigator. Miranda has provided a good balance between the rights of the accused and the conduct of law enforcement."

[18] Amicus relies (Br. 25) on an earlier letter from a DEA official that states that the giving of *Miranda* warnings in "a stressful environment" following an arrest "can have a chilling effect" on a suspect's willingness to cooperate. Memorandum from Richard Fiano, DEA Chief of Operations 2 (Oct. 13, 1999). The DEA has made clear, however, that "regardless of any change in the *Miranda* rule which may result in this case, DEA will continue, as a policy matter, to counsel its Agents to provide *Miranda* warnings." Chief Counsel Memorandum (Feb. 22, 2000); accord DEA Deputy Chief Counsel Gleason Memorandum (undated, sent Oct. 1, 1997).

ognition of Section 3501's conflict with *Miranda* and the absence of sufficient reason to request this Court to overrule it.

3. *The alternatives to* Miranda. *Miranda* stated that "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described [in *Miranda*] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 U.S. at 490. The precise standard of constitutional adequacy that an alternative safeguard must satisfy is not before the Court in this case. If Congress or a state legislature were to provide for a set of limited warnings coupled with video or audio taping of the interrogation, or for some other alternative set of safeguards, such as pre-interrogation access to a magistrate, counsel, or other competent advisor, the Court would be faced with the question whether the *Miranda* rules remained applicable in the jurisdiction at issue. Section 3501, however, as its supporters intended, see U.S. Br. 18-20, seeks to return the law to its pre-*Miranda* state without providing any alternative. That approach would require overruling *Miranda*.

In considering the sea change in the law that is being proposed, it is worth recalling that the *Miranda* Court arrived at its solution only after concluding that the "totality of the circumstances" voluntariness test, as the sole protection for the Fifth Amendment rights of a custodial suspect, had failed. The "totality" test had been found inadequate not because of bad faith by police, or because of unwillingness of courts to grapple with the inquiry. It was inadequate because a "totality" test, without more, provided insufficient guidance to the police, left inadequate means for this Court to unify and expound the law, and resulted in an uncertain legal rule that could not secure the vital constitutional rights at stake. There has been no showing that a return to that regime would be successful today.

Respectfully submitted.

JANET RENO
Attorney General

SETH P. WAXMAN
Solicitor General

APRIL 2000

APPENDIX

Suppressed Statements Under *Miranda* In Federal Prosecutions

Year	Total Defendants Prosecuted*	*Miranda* Suppression Orders Reported to the Solicitor General**
1989	58,160	6
1990	60,521	7
1991	62,112	6
1992	66,502	10
1993	63,869	13
1994	62,327	2
1995	63,547	1
1996	65,480	3
1997	69,351	11
1998	78,172	9
1999	76,689	10
Totals	**726,730**	**78**

Notes

* The figures for "Total Defendants Prosecuted" for 1989-1998 are drawn from U.S. Department of Justice, Office of Justice Programs, *Federal Criminal Case Processing, 1982-98*, at 2 (Table 2); U.S. Department of Justice, Office of

Justice Programs, *Federal Criminal Case Processing, 1998*, at 26 (Table A.6). Information for 1999, through September 30, 1999, was obtained from the Department's Bureau of Justice Statistics. Memorandum from John Scalia (Mar. 15, 2000).

** The figures for the number of suppression orders are derived from adverse *Miranda* rulings (78) reported to the Solicitor General according to Justice Department requirements. See 28 C.F.R. 0.20(b); U.S. Attorney's Manual § 2-2.110 (June 1998). Seventy-six of those decisions were reported to members of the U.S. Senate in two letters: a November 5, 1977, letter to Senator Fred Thompson and a November 22, 1999, letter to Senator Strom Thurmond. This table adds adverse decisions reported through the end of 1999. The figures necessarily omit cases in which prosecutors did not report suppression orders and instances in which an unwarned statement was not offered into evidence. The number of cases in which confessions were suppressed (78) includes cases in which the government successfully challenged the suppression ruling on appeal (11), as well as cases pending on appeal (5). The table does not reflect whether the case was successfully prosecuted without the statement; whether the statement was also found to be involuntary under the totality-of-the-circumstances test; or whether the defendant ultimately agreed to plead guilty notwithstanding the suppression ruling.

Apr 10 2000

No. 99-5525

Supreme Court, U.S.
FILED
APR 10 2000
CLERK

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES W. HUNDLEY*
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

PAUL F. WASHINGTON
75 Rockefeller Plaza
New York, New York 10019
(212) 484-6753

Counsel for Petitioner

* Counsel of Record

April 10, 2000

WILSON – EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Anders v. *California*, 386 U.S. 738 (1967) 4
Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d. Cir. 1967) 6
Banco Nacional de Cuba v. *Sabatino*, 376 U.S. 398 (1964) 6
Berkemer v. *McCartey*, 468 U.S. 420 (1984) 19
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) 5
Boykin v. *Alabama*, 395 U.S. 238 (1969) 17
Bram v. *United States*, 168 U.S. 532 (1897) 8, 9
Brandenberg v. *Ohio*, 395 U.S. 444 (1969) 10
Bush v. *Lucas*, 462 U.S. 367 (1983) 5
Carnley v.*Cochran*, 369 U.S. 506 (1962) 16
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 4
Cooper v. *Aaron*, 358 U.S. 1 (1958) 4
Davis v. *United States*, 512 U.S. 452 (1994) 8
Edwards v. *Arizona*, 451 U.S. 477 (1981) 7
Escobedo v. *Illinois*, 378 U.S. 478 (1964) 16
Gooding v. *Wilson*, 405 U.S. 518 (1972) 11
Griffin v. *California*, 380 U.S. 609 (1965) 8
Harris v. *New York*, 401 U.S. 222 (1971 ..... 7, 9, 18
Henderson v. *Morgan*, 426 U.S. 637 (1976) 17
Lefkowitz v. *Cunningham*,431 U.S. 801 (1977) 8
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 11
Maine v. *Moulton*, 474 U.S. 159 (1985) 16
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 4
Michigan v. *Payne*, 412 U.S. 47 (1973) 11
Minnick v. *Mississippi*, 498 U.S. 146 (1990) 12
Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... *passim*
Mitchell v. *United States*, 526 U.S. 314 (1999) 8
Mullaney v. *Wilbur*, 421 U.S. 684 (1975) 2
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 8
New York v. *Quarles*, 467 U.S. 649 (1984) 10

TABLE OF AUTHORITIES

CASES Page

Oregon v. *Elstad*, 470 U.S. 298 (1985) 7, 8
Oregon v. *Hass*, 420 U.S. 714 (1975) 9, 18
Patterson v. *New York*, 432 U.S. 197 (1977) 2
Richards v. *Wisconsin*, 520 U.S. 385 (1997) 16
Schenck v. *United States*, 249 U.S. 47 (1919) 10
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 5
Smith v. *Robbins*, 120 S. Ct. 746 (2000) 4
United States v. *Nixon*, 418 U.S. 683 (1974) 4
United States v. *Sharpe*, 470 U.S. 675 (1985) 16
In re Winship, 397 U.S. 358 (1970) 2
Withrow v. *Williams*, 507 U.S. 680 (1993) 14

CONSTITUTION

U.S. Const. amend. I 10

FEDERAL STATUTE

18 U.S.C. § 3501 ..... *passim*

FEDERAL RULES

Fed. R. Crim. P. 11(c) 17
Fed. R. Evid. 804(b)(3) 17

SCHOLARLY AUTHORITIES

Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 Cornell L. Rev. 101 (2000) 12, 13
Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 6
Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117 (1978) 6

TABLE OF AUTHORITIES

SCHOLARLY AUTHORITIES Page

Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 ..... 8, 11, 12
Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988) 11, 12

INTRODUCTION

Court-Appointed *Amicus Curiae* ("*amicus*") presents four arguments in defense of 18 U.S.C. § 3501, each of which is untenable. *First*, *amicus* contends that § 3501 is constitutional because *Miranda*'s core holdings exist in a heretofore unknown realm of "constitutional common law" rulings by this Court, subject to Congressional overruling, but nonetheless applicable to the States. *Amicus* Br. 4. Having erroneously denied that *Miranda*'s requirements are "constitutional standards for protection of the privilege," *Miranda* v. *Arizona*, 384 U.S. 436, 491 (1966), *amicus* stretches for support from areas such as the dormant Commerce Clause and *Bivens* actions. None of these, however, creates the hybrid species of constitutional common law that *amicus* suggests.

Second, amicus points to this Court's post-*Miranda* jurisprudence as having stripped *Miranda* of constitutional status. That this Court has recognized a public safety exception, for example, no more undermines *Miranda*'s core holdings than a "clear and present danger" exception undermines First Amendment freedoms. *Third, amicus* half-heartedly contends that even if *Miranda*'s requirements are constitutional and cannot be dislodged by Congress, § 3501 satisfies *Miranda*'s requirements. This is patently false. Rather than require the minimum threshold information essential to dispel interrogation's compelling pressures and provide for a knowing and intelligent waiver of the privilege, § 3501 reverts to an amorphous due process totality of the circumstances voluntariness test.

Finally, amicus contends that if *Miranda* is a constitutional ruling and § 3501 does not meet *Miranda*'s requirements, the Court should overrule *Miranda* and adopt § 3501's test of "voluntariness" based on the totality of the circumstances. Thus, *amicus* would have the Court reject a prominent 33-year-old precedent that is workable, the foundation of numerous subsequent doctrinal developments, widely relied on by

the public, police and criminal justice system, not shown to be unsound in principle and not undermined by any subsequent change in its factual premises.

ARGUMENT

1. The bulk of *amicus*' brief is spent unsuccessfully attempting to resolve *amicus*' self-made conundrum: demonstrating how *Miranda*'s core requirements could be "non-constitutional" and hence voidable at Congress' pleasure, yet sufficiently constitutional to reverse State court criminal convictions. See *Amicus* Br. 4-28. Having taken petitioner to task for supposedly failing to offer a "reconciling theory" of the disparate strands of this Court's Fifth Amendment jurisprudence, *amicus* proffers a theory that places into doubt the nature of every decision of this Court interpreting any provision of the Bill of Rights and that authorizes this Court to adopt rules that preempt state law, even though they are wholly untethered to the Constitution.[1]

Amicus' theory is unsound for a number of additional reasons. First, *Miranda*'s express language demonstrates that its requirements are constitutional in nature. See Pet. Br. 13-20. Second, *Miranda*'s underlying reasoning does as well. The Court expressly held that the privilege provides greater pro-

[1] For example, every argument made by *amicus* could be asserted with equal force against the reasonable doubt standard. *See In re Winship*, 397 U.S. 358, 364 (1970) (State must prove all statutory elements of an offense beyond a reasonable doubt and that burden does not shift); *Mullaney* v. *Wilbur*, 421 U.S. 684, 702 (1975) (same). *Patterson* v. *New York*, 432 U.S. 197 (1977) (same). Nothing in the Constitution's text requires it; it certainly creates a presumption of innocence that is unwarranted perhaps in the vast majority of indictments, and probably most jurisdictions would continue to follow it even if the Court were to abandon it.

tection, *i.e.*, the right to be free of pressures which discourage silence and thereby render the decision to incriminate oneself less than "truly the product of free choice," *Miranda*, 384 U.S. at 457; *id.* at 458 (same), than the Due Process Clause prohibition on "coercion," *i.e.*, blatant physical coercion or psychological ploys that actually "overbear" the will of an accused, forcing the suspect to confess.

To "permit a full opportunity to exercise the privilege" and to "combat" custodial interrogation's "inherently compelling pressures," the Court announced its core holding that the "accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. The Court made abundantly clear that the rules it announced were "*constitutional* standards for the protection of the privilege." *Id.* at 491 (emphasis added).

To be sure, *Miranda* also requires law enforcement officials to abide by the specific *Miranda* warning formulations, while inviting both levels of government to develop alternative safeguards. *Id.* at 444-45, 467, 479. But that is not all that *Miranda* held, and *Miranda*'s additional holdings doom § 3501. First, the Court explicitly reserved to itself the authority to determine whether those alternative safeguards are "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467. As explained below, § 3501 does not meet that standard. Second, and more fundamentally, the *Miranda* Court, apart from announcing specific rules, also set forth a core holding — which it never invited the federal or state governments to supplant (nor could it under our constitutional system) — that government must provide "fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." *Id.* at 444. Section 3501 does not satisfy that core require-

ment, because, among other things, it does not *require* that defendants be informed of their rights in advance.

Amicus' constitutional common law theory could come to the aid of § 3501 only if the theory establishes that *Miranda* falls within a category of judicial rulings where Congress, not the Court, has the authority (i) to determine that alternatives to *Miranda*'s specific rules pass muster, or (ii) to override *Miranda*'s core holding. But there is no such species of constitutional common law that permits Congress to make such judgments or to override core constitutional holdings. If there were, it would eviscerate the right of judicial review articulated under *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803), and affirmed under far more serious assaults. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 17-20 (1958); *United States* v. *Nixon*, 418 U.S. 683, 703, 705 (1974); *City of Boerne* v. *Flores*, 521 U.S. 507, 535-36 (1997). Thus, it comes as no surprise that the materials cited by *amicus* fail to establish such a category of law or that *Miranda* falls within such a hybrid class.

Amicus' repeated invocations of the line of cases running from *Anders* v. *California*, 386 U.S. 738 (1967), to *Smith* v. *Robbins*, 120 S. Ct. 746 (2000), are unavailing. See *Amicus* Br. 4, 11, 12. In *Anders*, the Court outlined procedures governing the withdrawal of appellate counsel that satisfy constitutional requirements. *Anders*, 386 U.S. at 744. In *Robbins*, the Court simply affirmed that the States are free to develop different procedures, provided that their alternative "procedures adequately safeguard a defendant's right to appellate counsel." 120 S. Ct. at 753; see *id.* at 756-67. The Court did not suggest that Congress itself had the ability to determine whether the alternatives were equally effective. Quite the contrary, the Court made that decision itself. Nor did the

Court suggest that Congress had the power to overrule a core holding similar to that set forth in *Miranda*.

Amicus goes even further afield when it turns to the line of cases stemming from *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). See *Amicus* Br. 3, 11-14, 16-17, 20. Whatever else *Bivens* is, it is not an example of constitutional common law that is sufficiently constitutional that it can apply to States, but insufficiently constitutional that it can be supplanted by Congress. First, post-*Bivens* decisions have made clear that *Bivens* was based principally on an interpretation of the statute conferring federal-question jurisdiction. See *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983); *Schweiker* v. *Chilicky*, 487 U.S. 412, 420-21 (1988). As a case of statutory interpretation, *Bivens* has nothing to say about Congress' ability to dislodge the Court's interpretation of the Constitution. Second, in *Bivens*, the Court announced the existence of a cause of action against *federal* officials alone. *Bivens*, 403 U.S. at 389, 394. Thus, *Bivens* in no way speaks to the question of the extent to which a judicial ruling like *Miranda*, which applies to *both* federal *and state* officials, see *Miranda*, 384 U.S. at 456-57, 463-64, is, or is not, "constitutional" in nature. See also *Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring) (the Court's ability to provide for "special prophylactic measures" "has little, if indeed any bearing" on whether the judiciary could authorize a monetary damages remedy).

The Court's dormant Commerce Clause jurisprudence, see *Amicus* Br. 18 n.11, is also unavailing. The Court's action in striking down a state activity under the dormant Commerce Clause is based upon the Court's purely constitutional determination that Congress, not the States, should exercise a particular type of power over interstate commerce which preserves the status quo of an open national market commanded by the Constitution unless Congress declares otherwise. If

Congress later acts to permit the States to undertake the prohibited activity, it is not overriding the Court, but merely acting in the field that the Constitution has preserved for it. Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1138-41 (1978). Furthermore, the Framers granted Congress plenary authority to enforce the Commerce Clause, but they gave Congress no similar authority to define the scope of the Bill of Rights. The dormant Commerce Clause is specifically intended to restrain States in favor of the national government. It therefore cannot inform the Court's judgment about rules that apply to decisions under the Bill of Rights, which was enacted to restrain the federal government in favor of the States and individuals.

Amicus' reliance on act of state doctrine cases, *Amicus* Br. 17-18, is similarly misplaced, for in those cases the Court developed a doctrine of federal common law to preserve the power of Congress and the National Executive to act in an area "intrinsically federal," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 (1964), similar to other areas where there exist "considerations supporting exclusion of state authority." *Id.* The act of state doctrine cases therefore do not provide a rationale for *Miranda*'s application in State court criminal proceedings, an area primarily of State concern. See Schrock & Welsh, *supra* at 1133-34. In addition, the fact that Congress later acted in this area by authorizing courts to ignore certain foreign state acts in limited circumstances, see *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 181 (2d Cir. 1967), did not constitute a reversal of the Court, but, rather, Congress acting in the field preserved for it.[2]

---

[2] Finally, even the apparent source of *amicus'* constitutional common law theory—Monaghan's article *Foreword: Common Law*, 89 Harv. L. Rev. 1 (1975), *see Amicus* Br. 10 n.7—does not support *amicus'* position. It does not suggest that Congress has the power to overrule *Miranda*'s

2. *Amicus* argues that the Court's subsequent decisions demonstrate that the "Constitution does not require *Miranda* warnings." *Amicus* Br. 7. This is neither surprising nor particularly relevant. As noted above, *Miranda* itself held that its specific formulation of the warnings is not required. *Amicus'* claim would have force if this Court's subsequent decisions demonstrated that the Court had rejected *Miranda*'s core holding that some procedures "at least as effective in apprising accused persons of their right[s]" are required. *Miranda*, 384 U.S. at 467. The Court has never so held, but has instead reaffirmed that core holding in a number of subsequent cases. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298, 317 (1985) ("[t]he Court today in no way retreats from the bright-line rule of *Miranda*").

Amicus nonetheless argues that the core holding is "not good law," *Amicus* Br. 38, because the Court has retreated from *Miranda* and held that the privilege requires no more than traditional due process analysis. To the contrary, the Court has continued to uphold suppression of unwarned statements in the prosecution's case in chief even where the statements were not "involuntary" under a totality of circumstances test. See, *e.g.*, *Edwards* v. *Arizona*, 451 U.S. 477, 483 (1981) (excluding statement trial court found "to have been 'voluntary'"); *Harris* v. *New York*, 401 U.S. 222, 224

---

core holding. Indeed, the article argues that "true constitutional rules," which cannot be overridden in any manner by mere legislation, are those that are clearly "related to the core policies underlying the constitutional provision." *Id.* at 33. By that measure, *Miranda*'s core holding surely is a "true constitutional rule[]." The article goes even further in acknowledging that is may be "a constitutional requirement that police interrogation be consonant with *specified rules*," *id.* at 33 (emphasis added), and concludes that a "prophylactic rule might be constitutionally required when it is necessary to overprotect a constitutional right." *Id.* at 20.

(1971) (statements suppressed in case in chief although there was no claim that statements were "coerced or involuntary").

Furthermore, concern regarding intelligent waiver continues to be reflected in the Court's opinions. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 458 (1994) (right to counsel "is sufficiently important . . . that it 'requir[es] the special protection of the knowing and intelligent waiver standard' ") (alteration in original) (quoting *Edwards*, 451 U.S. at 483); *Elstad*, 470 U.S. at 314 ("suspect made a rational and intelligent choice whether to waive or invoke his rights").

The substantially broader protection afforded by the privilege than the Due Process Clause is also reflected in the fact that the privilege prohibits admission of confessions extracted under threat of a court's contempt powers,[3] an employment discharge,[4] or subsequent use of a defendant's silence as evidence of guilt,[5] despite the fact that none of these pressures or influences actually breaks the accused's will. See also Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 440-46 (1987) (discussing distinction between Fifth Amendment "compulsion" and Due Process Clause "coercion"). Moreover, the Court's recognition of the privilege's broad protection is longstanding. In *Bram* v. *United States*, 168 U.S. 532 (1897), the Court held that the interrogator's statement: " 'If you had an accomplice, you should say so, and not have the blame for this horrible crime on your own shoulders,' " *id.* at 539, violated the privilege. *Id.* at 565. The Court concluded that " 'the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and,

---

[3] *See Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79-80 (1964).

[4] *See Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806-09 (1977).

[5] *See Mitchell* v. *United States*, 526 U.S. 314, 328-29 (1999); *Griffin* v. *California*, 380 U.S. 609, 614-15 (1965).

therefore, excludes the declaration *if any degree of influence has been exerted.*' " *Id.* (emphasis added) (quoting Russell, *Treatise on Crimes and Misdemeanors* 479 (6th ed. 1896)). Similarly, the Court held in *Miranda* that *post hoc* analyses of the record for "overt physical coercion or patent psychological ploys" are ineffective in determining whether the privilege's requirement of a truly "free choice" has been met, 384 U.S. at 457, and further held that contemporaneous warnings are "indispensable" to dispel interrogation's "pressures." *Id.* at 469.

Amicus claims that three of the Court's subsequent cases "rest directly on *Miranda*'s non-constitutional status," *Amicus* Br. 8 (citing *Harris*, 401 U.S. at 224, *Oregon* v. *Hass*, 420 U.S. 714, 722 (1975), and *New York* v. *Quarles*, 467 U.S. 649, 654 (1984)). Yet none of the three does so. In *Harris*, the Court held that incompletely warned statements, although not admissible in the case in chief, could be introduced for the limited purpose of impeachment. In reaching this conclusion, the Court reasoned that while " 'the Government cannot make an affirmative use of evidence unlawfully obtained[,] [i]t is quite another [thing] to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.' " *Harris*, 401 U.S. at 224 (quoting *4* v. *United States*, 347 U.S. 62, 65 (1954)). Thus, *Harris*'s rationale is consistent with the view that the statements were obtained by an "illegal method," *i.e.*, without the constitutionally required procedures found necessary by the Court to secure the privilege. *Hass* was similarly based on the principle that "inadmissibility [for impeachment] would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence." 420 U.S. at 723. Here, again, the Court accepted that the accused has a "constitutional right" that may have

been violated. *Harris* and *Hass* therefore hardly prove that *Miranda's* requirements are "non-constitutional."

Amicus places great reliance on a footnote in *Quarles*: "absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind; and we do not believe that the doctrinal underpinnings of *Miranda* require us to exclude the evidence." 467 U.S. at 658 n.7. *Amicus* interprets this footnote as a holding that the privilege is not violated when pressures are placed on an accused to confess that are short of actual coercive actions that break the defendant's will, *i.e.*, that no substantive difference resulted from *Miranda*'s recognition that the privilege, in addition to the Due Process Clause, applies. There is no reason to ascribe such a broad holding to the *Quarles* footnote, nor does every public safety exception work a modification to the right or privilege at issue. This kind of limit on a constitutional right has been recognized even in the First Amendment context where the language seems much more plainly aimed at limiting governmental intrusion. Thus, not withstanding the phrase, "Congress shall make no law abridging freedom of speech," U.S. Const. amend. I, the Court has long recognized that "clear and present danger" is an essential limit on the right. See *Schenck* v. *United States*, 249 U.S. 47, 52 (1919); *Brandenberg* v. *Ohio*, 395 U.S. 444, 447 (1969). *Quarles* is much better understood as following that same basic approach to constitutional interpretation.

The heart of *amicus*' claim that *Miranda*'s requirements are non-constitutional is *amicus*' belief that a judicially devised protection for a constitutional right that sweeps more broadly than the right is non-constitutional and subject to modification by Congress, so long as Congress' scheme "honors" what the Constitution requires. *Amicus* Br. 4. Ac-

cording to *amicus*, Congress may dislodge a Court ruling that " 'overprotects a constitutional right' " and do what Congress "thinks wisest." *Id.* at 12. The problems with *amicus*' position are numerous.

First, as demonstrated in petitioner's brief at 25-27, the Court's constitutional jurisprudence is replete with prophylactic protections that sweep more broadly than the underlying right. In addition to creating "prophylactic *constitutional* rules," *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973) (emphasis added), regarding criminal procedure, see Pet. Br. 26-27 (discussing cases), the Court has devised prophylactic rules regarding, for example, takings violations, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982), and abridgment of freedom of speech, see *Gooding* v. *Wilson*, 405 U.S. 518 (1972) (presuming violation of freedom of speech from mere possibility of statutes deterring speech). See Schulhofer, *supra* at 448-49 (discussing "pervasive" nature of prophylactic constitutional rules); Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988). *Amicus* simply ignores these problems.

Second, the Court has justified its creation of prophylactic rules protecting underlying constitutional rights as necessary given limits on courts' interpretive powers and other circumstances confronting courts. Thus, in *Loretto*, the Court explained that to "avoid[] otherwise difficult line-drawing problems" and adopt a test with "relatively few problems of proof," a permanent physical occupation would be deemed a per se taking. 458 U.S. at 436-37. In *Minnick*, the Court defended the rule adopted in *Edwards* that once an accused requests counsel, officials may not reinitiate questioning until counsel has been made available to him, by noting that the rule was designed to prevent police from badgering a defendant into waiving previously asserted *Miranda* rights and

"conserves judicial resources which would otherwise have been expended in making difficult determinations of voluntariness." *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990). Similarly, the Court held in *Miranda* that any *post hoc* examination of whether the privilege had been violated would necessarily have to determine whether the accused was, despite lack of warning, aware of her rights, an inquiry which could "never be more than speculation." *Miranda*, 384 U.S. at 469. Moreover, still left to be determined was whether the accused, despite lack of warning, nonetheless knew that her particular interrogators were prepared to honor her exercise of the privilege "at that point in time." *Id.* The Court rejected such speculative *post hoc* inquiries in favor of warnings—"a clearcut fact." *Id.*

The creation of prophylactic rules thus constitutes a common and justified part of the Court's exercise of its powers to interpret the Constitution's requirements. As one commenter has noted, "it makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that these realities be ignored." Strauss, *supra* at 208; see Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 Cornell L. Rev. 101, 169 (2000) ("under any plausible approach to constitutional interpretation, courts must be allowed to take into account their fact-finding limitations"); Schulhofer, *supra* at 453.

There is thus no support in the Court's cases for *amicus*' claim that the "Court would only have authority to insist on warnings or their equivalents if the admission of a statement obtained without these measures would violate the [underlying] Constitutional [right]." *Amicus* Br. 38. *Amicus*' claim is an attack on "the ability of the Court to interpret constitutional provisions in light of institutional realities, to take into

account its own fact-finding limitations, and to utilize presumptions and prophylactic rules in order to make constitutional rights more meaningful." Kamisar, *supra* at 179.

3. *Amicus* argues in the alternative that if *Miranda* is constitutional, then § 3501 plus "the legal landscape that surrounds it," provides "more than adequate protection" against "police compulsion." *Amicus* Br. 28. *Amicus* studiously avoids arguing that § 3501 actually meets *Miranda*'s literal requirements, instead admitting that § 3501 violates *Miranda*'s core requirement that alternative procedures be "at least as effective" in apprising accused persons of their rights and assuring an opportunity to exercise them. *Id.* at 38. *Amicus* attempts to skirt this predicament with the untenable claim that this core *Miranda* holding was "not necessary to the decision." *Id.* As discussed above, this claim is untenable. See Pet. Br. 16-18.

Having admitted that § 3501 violates *Miranda*'s core requirement and can only stand if *Miranda* is overruled (or deemed already overruled *sub silentio*), *amicus* nonetheless repeatedly asserts that § 3501 "preserves the best prophylactic features of *Miranda*." *Id.* at 33. But this is patently not the case.

Miranda, for example, held that once an accused "indicates . . . . that he does not wish to be interrogated, the police may not question him," 384 U.S. at 445, a rule the Court has continued to respect. Section 3501, however, does not require exclusion of such statements. Thus, § 3501 offers far less incentive for police to honor assertions of the privilege and far less protection against use at trial of statements obtained from persons who asserted their right not to speak to police.

Miranda held that if the accused "states that he wants an attorney, the interrogation must cease until an attorney is pre-

sent." *Id.* at 474. The Court reinforced this aspect of *Miranda* in *Edwards* and *Minnick.*

Upholding § 3501 would require the Court to overrule *Minnick, Edwards* and *Miranda.* For example, statements extracted after an accused has requested, but not received, counsel by police who themselves "initiate" communication would not be required to be excluded, as *Edwards* held, but would be admissible if found "voluntary" under all the circumstances. Thus § 3501 strips away protections around the right to counsel and permits admission of statements obtained from persons who expressed their desire not to speak to police without an attorney present.

Section 3501 also dispenses with the requirement of a knowing and intelligent waiver of constitutional rights. *Miranda* specifically applied the "high standards of proof for the waiver of constitutional rights" to custodial interrogation. *Id.* at 475. The requirements of *Miranda* safeguard a fundamental trial right by protecting a defendant's Fifth amendment privilege against self-incrimination and facilitate the correct ascertainment of guilt by guarding against the use of unreliable statements at trial. See *Withrow* v. *Williams,* 507 U.S. 680, 691 (1993). Section 3501, which fails to demand a knowing and intelligent waiver of these fundamental rights, cannot possibly afford them the protection that *Miranda* and its progeny do.

The expansion of "other protective measures" does not remedy § 3501's shortcomings. *Amicus* contends that the development of civil, criminal and administrative penalties bolsters § 3501, together providing the level of constitutional protection defined in *Miranda.* Among its many flaws, this argument fails to distinguish between the need to protect exercise of individual rights and affording a remedy when such rights are violated. *Post hoc* remedies designed to address

unconstitutional acts by government actors may, at some level, act as a deterrent on police officers. However, they provide no opportunity for an accused to make a free and intelligent choice regarding whether to exercise or waive his constitutional rights during custodial interrogation. Without procedures in place to secure exercise of the privilege, "what was proclaimed in the Constitution . . . become[s] but a 'form of words' in the hands of government officials." *Miranda,* 384 U.S. at 444 (quoting *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920)).

Underlying *amicus*' claim that § 3501 provides "adequate" protection of the privilege is *amicus*' claim that the privilege "prevents the police from in any way forcing, but not causing, a confession." *Amicus* Br. 29. *Amicus* equates the privilege with the Due Process Clause's ban on police breaking or overbearing the will of the accused and "forcing" a confession. The privilege provides broader protection than does a mere prohibition on pressures so extreme as to break the accused's will. See *supra* at 7-9. Moreover, *amicus*' distinction between "forcing" and "causing" is unprincipled and unworkable. *Amicus* would return the courts to attempting to determine on a case-by-case basis how much pressure is too much pressure, see *Miranda,* 384 U.S. at 506-09 (Harlan, J., dissenting). *Miranda,* in contrast, provides an objective procedure for bracing the accused against the range of pressures to incriminate herself found in the custodial interrogation process, a procedure both more effective in protecting and more true to the nature of the privilege than § 3501's totality of the circumstances test.

In an attempt to bolster its claim that § 3501 is adequate, *amicus* attacks petitioner's "premise" as "extraconstitutional." Indeed, *amicus* unambiguously declares that "the crucial point for purposes of this case" is that "any obligation *affirmatively*

to assist a suspect is not even arguably required by the Fifth Amendment as the Framers wrote it." *Amicus* Br. 29. But this attack is made upon a straw man. *Miranda* imposes no affirmative obligation to assist; rather, it imposes an obligation to *inform* a suspect of his or her most basic constitutional rights. It is a strange conceptualization of a legal duty to inform another of material information to argue that this is gratuitous "assistance." Moreover, it is an equally strange conception of justice which finds the dissemination of information about constitutional rights to be unwarranted assistance. See *Escobedo* v. *Illinois*, 378 U.S. 478, 490 (1964) ("no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizen's abdication through unawareness of their constitutional rights").

The imposition of affirmative, *constitutional* obligations on law enforcement officers is neither novel, unduly burdensome nor inconsistent with the Constitution. For example, an accused's right to counsel also imposes a variety of obligations. See, *e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 171 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek [counsel's] assistance."); *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962) ("right to be furnished counsel does not depend on a request"). Officers are required to "knock and announce" their identity when serving a warrant at a dwelling. See *Richards* v. *Wisconsin*, 520 U.S. 385, 391-95 (1997) (no blanket exception to the "knock and announce" requirement for felony drug investigations). In the course of an investigative detention or *Terry* stop, officers are required to pursue their investigation diligently. *E.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 684 (1985) ("'an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop'") (quoting *Florida* v. *Royer*, 460 U.S. 491, 500 (1983) (plurality)).

The imposition by the Court of an affirmative obligation on officers to inform a suspect in custody of his rights is proportional under the circumstances. As a purely legal matter, custodial interrogation represents an event fraught with legal consequences, not unlike that of a guilty plea. *Miranda* quite accurately states in its famous warnings that "anything [the suspect says] can and will be used against [him] in court." 384 U.S. at 469. The Federal Rules of Evidence, for example, render immediately admissible any statement by a suspect that is in any way against his interest. See Fed. R. Evid. 804(b)(3). As *Miranda* recognized, admission of such statements in a trial represents some of the most devastating evidence available to the prosecution. 384 U.S. at 466. Accordingly, as with a guilty plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure, the legal ramifications of custodial interrogation demand that the suspect be informed of each and every one of the rights that he or she waives by agreeing to make a statement to officers. Cf. *Henderson* v. *Morgan*, 426 U.S. 637, 644-45 (1976) (guilty plea is not voluntary unless defendant had " 'real notice of the true nature of the charge against him' ") (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941)). Indeed, in the guilty plea context, counsel's representations are insufficient. See *id.* at 650 (White, J., concurring); Fed. R. Crim. P. 11(c). No plea can be entered in the absence of the defendant and without the defendant's own acknowledgment that he or she is waiving a panoply of constitutional rights. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). Similarly, without the *Miranda* warnings or a functional equivalent, given in advance of questioning by officers, there can be no assurance that the defendant's statements represent a voluntary and intelligent waiver of the right to avoid self-incrimination.

4. *Amicus* argues that if the Court is reluctant to allow Congress to legislate the scope of the right against compelled

testimony, then the Court should nonetheless overrule *Miranda*. Petitioner addresses the issue of *stare decisis* in his opening brief, see Pet. Br. 30-45, but, it may be important to respond to *amicus*' argument that, in spite of a number of important adjustments to the scope of *Miranda*'s rules protecting the right, the consequences of a *Miranda* violation are incongruent and disproportional. *Amicus* Br. 41-43.

Amicus again trades fast and loose on fundamentally different concepts of voluntariness. In the *amicus*' view, the absence of coercion through threat, promise or outright harm renders a statement admissible. If this is correct at all, it is only so under a due process analysis of voluntariness. This analysis emerged pre-*Miranda*, when the Fifth Amendment's right against compelled self-incrimination did not apply to the States, as a way for courts to assess whether a confession was admissible under the Fourteenth Amendment's due process standard. *Miranda*, 384 U.S. at 506 (Harlan, J., dissenting). This analysis, by its own terms, could look no further than to whether what the interrogators had done was fundamentally unfair, and its application led to some odd results. See *e.g.*, Br. *Amici Curiae* Griffin B. Bell, et al., at 21 n.18.

The due process standard of voluntariness remains relevant because it continues to play an important supporting role in criminal trial practice. A defendant whose unwarned statement has been suppressed under *Miranda* may have that statement introduced as impeachment evidence if the defendant takes the stand to testify. The Court has found the introduction of such testimony warranted to protect the integrity of trial. See *Harris*, 401 U.S. at 224; *Hass*, 420 U.S. at 723. However, in order to ensure the reliability of such testimony (again to protect the integrity of the process), the trial court determines whether the statements were voluntary under a due process test; that is, whether they were a product of coercion, threats, harm or some other activity that might affect their reliability. Using only this "due process" understanding of voluntariness, *amicus* claims that *Miranda*'s sweep is disproportionately broad because it operates to exclude statements that police did not coerce from the defendant. However, this not the standard of voluntariness proposed under *Miranda* and it is not the Court's standard for voluntariness under waiver law.

In applying the privilege to the custodial interrogation context, the *Miranda* Court embarked upon a different and more specific analysis – one in which the suspect's right not to give compelled statements and to remain silent in the face of his or her interrogators was at issue, not the broader question of the integrity of the process. In analyzing the scope of this specific right, the Court simply held that a suspect could not make a *voluntary* choice to waive rights of which he or she was unaware. *Miranda*, 384 U.S. at 468

Miranda's reach therefore is not overbroad given the scope of the privilege. It assures a voluntary and knowing waiver of the privilege. It provides clarity for law enforcement and courts alike. It shifts the burden of providing complete information about constitutional rights to the party with both the knowledge and power to do so. Indeed, given the difficulties encountered applying the totality of the circumstances test pre-*Miranda*, *Miranda's* rule is not overbroad even with respect to guarding against Due Process Clause conceptions of coercion in the interrogation process. As noted in petitioner's opening brief, while *Miranda* may sweep too broadly and too narrowly in very specific circumstances, see Pet. Br. 32; *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984), *Miranda*'s approximate fit in both directions defeats any claim of incongruence under *Boerne*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
JEFFREY T. GREEN
KURT H. JACOBS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JAMES W. HUNDLEY*
BRIGLIA & HUNDLEY, P.C.
The Mosby Professional Building
10560 Main Street, Suite 314
Fairfax, Virginia 22030
(703) 385-8005

PAUL F. WASHINGTON
75 Rockefeller Plaza
New York, New York 10019
(212) 484-6753

Counsel for Petitioner

* Counsel of Record

April 10, 2000

Jan 18 2000

(N)

No. 99-5525

Supreme Court, U.S.
FILED
JAN 18 2000
CLERK

In The
Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL SHERIFFS' ASSOCIATION, AND THE VIRGINIA ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF NEITHER PARTY.

(List of Counsel on Inside Front Cover)

2080

Of Counsel:

GENE VOEGTLIN, ESQ.
International Association of
Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

RICHARD WEINTRAUB, ESQ.
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram
Chicago, Illinois 60657-4330

DANA SCHRAD, ESQ.
Executive Director
Virginia Association of
Chiefs of Police
1606 Santa Rosa Road
Suite 134
Richmond, Virginia 23288

Counsel For Amici Curiae:

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland Ave.
Suite 1008
Chicago, Illinois 60656
E-mail: AELE@aol.com

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tele/Fax (630) 858-6392
E-mail: lelp@xnet.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

BRIEF OF *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THIS COURT SHOULD AFFIRM THAT THE RULE OF *MIRANDA v. ARIZONA* IS NOT A CONSTITUTIONAL MANDATE AND THAT VOLUNTARINESS IS THE SOLE TEST FOR CONFESSION ADMISSIBILITY 4

A. *AMICI* DO NOT SEEK A REVERSAL OF *MIRANDA v. ARIZONA* 7

B. *AMICI* SUBMIT THAT *MIRANDA* IS NOT A CONSTITUTIONAL MANDATE 8

C. *AMICI* SUBMIT THAT 18 U.S.C. § 3501 AND SIMILAR PROVISIONS AS MAY BE PASSED IN THE FUTURE BY THE STATES ON THIS SUBJECT ARE CONSTITUTIONAL AND APPROPRIATE EX-

CLUSIONARY RULE REFORM, AS WELL AS CARRYING OUT THE ESSENTIAL PURPOSE OF *MIRANDA* OF ENSURING VOLUNTARY CONFESSIONS 9

D. *AMICI* SUBMIT THAT POLICE ADMINISTRATORS AND PROSECUTORS WILL ENCOURAGE THE POLICE TO CONTINUE TO GIVE *MIRANDA* WARNINGS AS AN IMPORTANT INDICIA OF CONFESSION VOLUNTARINESS 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Page**

Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) 8
California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999), *reh'g denied en banc* 8
Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) 8
Harris v. New York, 401 U.S. 222 (1971) 4, 9
Michigan v. Tucker, 417 U.S. 433 (1974) 4, 9
Miranda v. Arizona, 384 U.S. 436 (1966) .... *passim*
New York v. Quarles, 467 U.S. 649 (1984) 3, 9
Oregon v. Elstad, 470 U.S. 298 (1985) 3, 9, 12
Oregon v. Hass, 420 U.S. 714 (1975) 4, 9
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 13
United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975) 11
United States v. Dickerson, 166 F. 3d 667 (4th Cir. 1999), *reh'g denied en banc* 3, 6
United States v. Nafkha, 1998 U.S. App. LEXIS 1653, 1998 WL 45492 (unpublished opinion 10th Circuit) 11
United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah 1997) 11
United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250 (D. Utah 1999) 11

Constitution

United States Constitution, IV 12
United States Constitution, V ..... *passim*
United States Constitution, VI ..... *passim*
United States Constitution, XIV 4

Statutes

18 U.S.C. § 3501 ..... *passim*
28 U.S.C. § 2680(h) 8
42 U.S.C. § 1983 8

Briefs

AELE *Amici* Brief for Petitioner, *Illinois v. Gates*, 462 U.S. 213 (1983) 11
AELE *Amici* Brief for Neither Party, *Ohio v. Robinette*, 519 U.S. 997 (1996) 12
AELE *Amici* Brief for Petitioner, *United States v. Leon*, 468 U.S. 897 (1984) 11

Article

F. Graham, *The Self-Inflicted Wound* (1970) 7
Supreme Court Will Review Miranda, 33, No. 49 Crime Control Dig. 1 (1999) 7

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

---

[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 17,000 members in 112 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Virginia Association of Chiefs of Police (VACP) is a professional membership association representing federal, state, and local law enforcement executives in the state of Virginia. The Association regularly provides certified training and professional conference services for its members.

Amici are national and state professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the process of interrogations; and (2) police legal advisors who, in their criminal jurisdiction

capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy and procedures on the subject.

Because of the relationship with our members, and the composition of our membership and directors–including active law enforcement administrators and counsel–we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

Amici reference the facts of the case which are recounted in the opinion below, *United States v. Dickerson*, 166 F. 3d 667, 674-77 (4th Cir. 1999), *reh'g denied en banc*.

SUMMARY OF ARGUMENT

This case is *not* about whether *Miranda* warnings should be discontinued.

Amici do *not* seek a reversal of *Miranda v. Arizona*, 384 U.S. 436 (1966). We do, however, submit that the rule in that case is not of constitutional dimension, that it is rather a "prophylactic" rule designed by the Court as an extra-constitutional means of ensuring police compliance with the fifth amendment protection against self-incrimination, as the Court has indicated in its rulings in *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York*

v. Quarles, 467 U.S. 649 (1984); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971); and other cases.

We urge the Court to adopt the ruling of the court below that 18 U.S.C. § 3501, and similar provisions as may be enacted into statutory law or court rules by the states in the future, are constitutional and appropriate exercises of legislative and judicial powers. Such provisions carry out the invitation of *Miranda* itself for further experimentation by the states and federal authorities to seek alternative means of protecting defendants' fifth and sixth amendment rights. *Amici* have long encouraged reform of the exclusionary rule, which we submit such legislative effort supports, as well as the broader goal of ensuring voluntary confessions.

We also believe that law enforcement agencies and officers will continue to use the *Miranda* warnings, no matter what the Court's ruling may be in this case. We believe that the warnings of constitutional rights are viewed as accepted practice and procedure and will continue to be critical indicia for suppression hearing courts and trial courts on the issue of voluntariness under the fifth and fourteenth amendments.

ARGUMENT

THIS COURT SHOULD AFFIRM THAT THE RULE OF *MIRANDA v. ARIZONA* IS NOT A CONSTITUTIONAL MANDATE AND THAT VOLUNTARINESS IS THE SOLE TEST FOR CONFESSION

ADMISSIBILITY.

A. *AMICI* DO NOT SEEK A REVERSAL OF *MIRANDA v. ARIZONA*.

B. *AMICI* SUBMIT THAT *MIRANDA* IS NOT A CONSTITUTIONAL MANDATE.

C. *AMICI* SUBMIT THAT 18 U.S.C. § 3501 AND SIMILAR PROVISIONS AS MAY BE PASSED IN THE FUTURE BY THE STATES ON THIS SUBJECT ARE CONSTITUTIONAL AND APPROPRIATE EXCLUSIONARY RULE REFORM, AS WELL AS CARRYING OUT THE ESSENTIAL PURPOSE OF *MIRANDA* OF ENSURING VOLUNTARY CONFESSIONS.

D. *AMICI* SUBMIT THAT POLICE ADMINISTRATORS AND PROSECUTORS WILL ENCOURAGE THE POLICE TO CONTINUE TO GIVE *MIRANDA* WARNINGS AS AN IMPORTANT INDICIA OF CONFESSION VOLUNTARINESS.

Over thirty years ago Congress passed 18 U.S.C. § 3501, ostensibly overruling *Miranda* for the federal courts and federal law enforcement agencies. Section 3501 makes traditional due process voluntariness the sole standard for the admissibility of confessions and incriminating statements in federal courts, the standard that existed prior to the *Miranda* extra-constitutional rule of warnings of fifth and sixth amendment rights.

Section 3501, however, led a very lonely existence after it was passed in 1968. It was ignored by federal prosecutors and federal courts and greeted with hostility by the United States Justice Department over the years, up to the present case.

A panel of the court below ruled 2-1 that a confession which is determined to be voluntary may be admitted as evidence in federal court despite a technical violation of *Miranda* pursuant to § 3501, and the court *en banc* declined reconsideration.

> The court below stated:
> In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.

Dickerson, 166 F.3d at 671.

Amici note that the *Miranda* decision has been controversial for many, in and outside of law enforcement. As noted by one commentator after the grant of certiorari in this case:

> While law enforcement authorities initially hated the decision, many within and outside the profession, believe that it actually helped to make police more professional. Some have even argued that having the Miranda warnings imposed on the police made them improve their investigative skills. However, opposition to and criticism of the decision has never really gone away.

Supreme Court Will Review Miranda, 33, No. 49 Crime Control Dig. 1 (1999). *See also* F. Graham, *The Self-Inflicted Wound* (1970).

In view of the many divergent views expressed by the several other *amici* in this case, we will not burden the Court with case law development, but state simply the following on behalf of our constituency of law enforcement administrators and officials:

A. *AMICI* DO NOT SEEK A REVERSAL OF *MIRANDA v. ARIZONA*.

We believe that law enforcement officers and officials have well-assimilated the *Miranda* rules into their policies and procedures. The overwhelming majority of officers on the street today have been trained in the post-*Miranda* era. Officers follow that decision and do not concern themselves, for the most part, with the academic and political debate over the warnings'

constitutional or extra-constitutional nature. They leave that for academicians and policy makers.

As policy makers and law enforcement officials, *amici* are primarily concerned with obtaining clear guidance from the Court which they can put into appropriate policy and procedure. They are also concerned with the civil liability ramifications of the Court's decision in this case. Obviously, if the Court rules that *Miranda* is a constitutional mandate, there is the possibility of civil liability exposure for intentional violations under the Federal Tort Claims Act, 28 U.S.C. § 2680(h), *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (federal agents), and 42 U.S.C. § 1983 (state and local officers). *See Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *reh'g denied en banc*.

Whatever the ultimate ruling of the Court in this case, however, we respectfully request clear guidance, not only for the law enforcement community, but also for the state legislatures and state supreme courts which may consider the adoption of appropriate statutes and court rules after the decision in this case.

B. *AMICI* SUBMIT THAT *MIRANDA* IS NOT A CONSTITUTIONAL MANDATE.

The brief of professor Paul G. Cassell on the petition for writ of certiorari, and now as appointed counsel for the respondent on the limited issue of § 3501's constitutionality, contains several arguments on the issue of whether *Miranda* is (a) A rule of constitu-

tional law or (b) A "prophylactic" rule of evidence, extra-constitutional in nature and designed to protect fifth and sixth amendment rights. The cases that we have cited above, *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971), all lead to one conclusion, *i.e.*, that (b) is the correct answer for this issue. *Amici* will not burden the Court with redundancy of case law development.

C. *AMICI* SUBMIT THAT 18 U.S.C. § 3501 AND SIMILAR PROVISIONS AS MAY BE PASSED IN THE FUTURE BY THE STATES ON THIS SUBJECT ARE CONSTITUTIONAL AND APPROPRIATE EXCLUSIONARY RULE REFORM, AS WELL AS CARRYING OUT THE ESSENTIAL PURPOSE OF *MIRANDA* OF ENSURING VOLUNTARY CONFESSIONS.

Prior to the *Miranda* decision in 1966 when the sweeping exclusionary rule was adopted, there were no statutory provisions similar to § 3501. In adopting what the Court viewed as a necessary "prophylactic" rule, it made clear that it did not wish to "create a constitutional strait jacket which will handicap sound efforts" by the federal and state authorities to construct rules and statutes to ensure compliance with the fifth amendment in custodial interrogation settings. The *Miranda* decision was clearly not intended to be the "last word" on the subject. In encouraging further development for the protection of defendants' rights by the states and federal government by appropriate and innovative procedures, the Court indicated that it wished primarily to "promot[e]

efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467.

The Court, in effect, issued an invitation to the states and Congress to be innovative and devise procedures that carried out *Miranda's* mission, and perhaps as well, in a more refined and sophisticated manner than *Miranda's* rather blunt, mechanical regimen.

Section 3501 is Congress's acceptance of that invitation. Obviously, the invitation would not have been placed on the table by this Court in the first place if the Court believed it had constructed a constitutional mandate in *Miranda*, and this view has been borne out by subsequent decisions of the Court noted above.

Section 3501 may also be viewed as an example of exclusionary rule reform. It is a sophisticated, well-thought-out procedural and remedial approach which incorporates *Miranda*-style warning indicia for voluntariness in subsection (b) (3) and (4):

§ 3501. Admissibility of confessions

. . . .

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the

time of making the confession, (3) *whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him*, (4) *whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel*; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(b) (emphasis added).

This view was adopted by the Tenth Circuit Court of Appeals in *United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975) (alternative holding) and more recently by two cases in the Tenth Circuit, *United States v. Rivas-Lopez*, 988 F. Supp. 1424 (D. Utah 1997) and *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250 (D. Utah 1999). Two years ago the IACP, AELE, and others filed a friend of the court brief in another § 3501 appeal, but the United States Court of Appeals reversed the district court and found that the confession was lawfully obtained, *United States v. Nafkha*, 1998 U.S. App. LEXIS 1653, 1998 WL 45492 (unpublished opinion, 10th Circuit), and did not reach the issue of § 3501's constitutionality.

The IACP and AELE have been at the forefront of

exclusionary rule reform. *See, e.g.*, our *amici* briefs in *Illinois v. Gates*, 462 U.S. 213 (1983) and *United States v. Leon*, 468 U.S. 897 (1984). Additionally, the IACP has supported exclusionary rule reform in two membership resolutions and in Congressional testimony.

Amici submit that the adoption of state legislative provisions and state supreme court procedural rules similar to § 3501 will further the general movement of this Court and others for exclusionary rule reform in the area of not only fifth amendment and sixth amendment issues, but fourth amendment issues as well. Such efforts will refine the protection of constitutional rights for defendants in place of judicially-devised remedies such as *Miranda*, which the Court noted in *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985), "sweeps more broadly than the Fifth Amendment itself."

D. *AMICI* SUBMIT THAT POLICE ADMINISTRATORS AND PROSECUTORS WILL ENCOURAGE THE POLICE TO CONTINUE TO GIVE *MIRANDA* WARNINGS AS AN IMPORTANT INDICIA OF CONFESSION VOLUNTARINESS.

As AELE, IACP, and NSA noted in our *amici* brief in *Ohio v. Robinette*, 519 U.S. 997 (1996) (traffic detainee need not be advised that traffic stop is over before police request consent to search), even when warnings of constitutional rights are not constitutionally required, good policy and practice may be to give such warnings. This Court has long recognized the value of warnings in the fourth amendment consent to search context as indicia of voluntariness, even though it has ruled that such warnings are not constitutionally

required. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Our point is simply this: if this Court approves the constitutionality of § 3501 and continues the exclusionary rule reform movement it has already put in place in post-*Miranda* cases, law enforcement officers will undoubtedly be encouraged by police policies and procedures–including prosecutorial policy direction–to continue giving the warnings of fifth and sixth amendment rights. This will especially be true if states adopt legislative and court rule counterparts to § 3501 which make the giving of warnings important indicia of voluntariness, as is likely to be the legislative and court rule approach.

In the end, the refinement of the process of protecting defendants' rights through various procedural devices adopted by the states that was envisioned by *Miranda v. Arizona* will take place and the *Miranda* Court's original goal will be achieved. Post-*Miranda* development by the Court has been, in essence, an evolutionary process. The Court has the opportunity in this case, *by upholding the constitutionality of § 3501*, to take *Miranda's* salutary purpose of ensuring voluntary confessions to a higher level of refinement and development.

CONCLUSION

Amici urge this Court to uphold the constitutionality of 18 U.S.C. § 3501 on the basis of its post-*Miranda* precedents and sound judicial policy.

Respectfully submitted,

Of Counsel:

GENE VOEGTLIN, ESQ.
International Association of Chiefs of Police, Inc.
515 North Washington St.
Alexandria, Virginia 22312

RICHARD WEINTRAUB, ESQ.
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram
Chicago, Illinois 60657-4330

DANA SCHRAD, ESQ.
Executive Director
Virginia Association of Chiefs of Police
1606 Santa Rosa Road
Suite 134
Richmond, Virginia 23288

Counsel for Amici Curiae:

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective Law Enforcement, Inc.
5519 N. Cumberland Ave.
Suite 1008
Chicago, Illinois 60656
E-mail: AELE@aol.com

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tele/Fax (630) 858-6392
E-mail: lelp@xnet.com

Jan 27 2000 (12)

Supreme Court, U.S.
FILED
JAN 27 2000
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF GRIFFIN B. BELL, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL C. RICHMAN
FORDHAM UNIVERSITY
SCHOOL OF LAW
140 West 62nd Street
New York, New York 10023
(212) 636-6845

ROBERT S. LITT
Counsel of Record
JONATHAN R. STREETER
JOHN A. FREEDMAN
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Amici Curiae

157529

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

4708

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. AFFIRMING THE CONSTITUTIONALITY OF SECTION 3501 WOULD REQUIRE OVERTURNING *MIRANDA* 3

II. BECAUSE THE *MIRANDA* RULE DOES NOT HAMPER EFFECTIVE LAW ENFORCEMENT AND IS DEEPLY ROOTED IN COMMUNITY EXPECTATIONS, THE PRINCIPLE OF *STARE DECISIS* STRONGLY COUNSELS AGAINST OVERRULING *MIRANDA* 5

A. Far from Being "Outdated, Ill-Founded or Unworkable," the *Miranda* Warnings Promote Effective Law Enforcement 6

1. *Miranda* Provides Bright Lines for Law Enforcement to Follow 11

2. *Miranda* Assists in Securing Convictions of the Guilty 19

B. Settled Community Expectations Weigh Heavily Against Overturning *Miranda* 22

1. The Public Has Accepted and Developed Strong Expectations About *Miranda* ..... 2?

2. Law Enforcement Has Developed Settled Expectations Concerning *Miranda* 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Arizona v. Roberson, 486 U.S. 675 (1988) 26

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 14, 21

Berkemer v. McCarty, 468 U.S. 420 (1984) 13, 20, 26

Blackburn v. Alabama, 361 U.S. 199 (1960) 14, 16

Bram v. United States, 168 U.S. 532 (1897) 14

Brown v. Allen, 344 U.S. 443 (1953) 21

California v. Acevedo, 500 U.S. 565 (1991) 6

Chambers v. Florida, 309 U.S. 227 (1940) 14, 21

Cicenia v. La Gay, 357 U.S. 504 (1958) 21

City of Boerne v. Flores, 521 U.S. 507 (1997). 5

Clewis v. Texas, 386 U.S. 707 (1967) 14

Colorado v. Bertine, 479 U.S. 367 (1987) 18

Colorado v. Connelly, 479 U.S. 157 (1986) 16

Crane v. Kentucky, 476 U.S. 683 (1986) 20

Crooker v. California, 357 U.S. 433 (1958) 14, 16, 21

Culombe v. Connecticut, 367 U.S. 568 (1961) 16

Davis v. North Carolina, 384 U.S. 737 (1966) 14, 15

Davis v. United States, 512 U.S. 452 (1994) 11, 26

Duckworth v. Eagan, 492 U.S. 195 (1989) 26

Edwards v. Arizona, 451 U.S. 477 (1981) 26

Fare v. Michael C., 439 U.S. 1310 (1978) (in chambers) 11

Fare v. Michael C., 442 U.S. 707 (1979) 13, 19

Fikes v. Alabama, 352 U.S. 191 (1957) 14, 15

Gallegos v. Colorado, 370 U.S. 49 (1962) 14

Gallegos v. Nebraska, 342 U.S. 55 (1951) 14

Greenwald v. Wisconsin, 390 U.S. 519 (1968) 14, 15

Haley v. Ohio, 332 U.S. 596 (1948) 14

Harris v. South Carolina, 338 U.S. 68 (1949) 14, 15

Haynes v. Washington, 373 U.S. 503 (1963) 15, 16, 21

Illinois v. Perkins, 496 U.S. 292 (1990) 27

Leyra v. Denno, 347 U.S. 556 (1954) 14

Lisenba v. California, 314 U.S. 219 (1941) 21

Lynumn v. Illinois, 372 U.S. 528 (1963) 15

Malinski v. New York, 324 U.S. 401 (1945) 14

Mallory v. United States, 354 U.S. 449 (1957)..... 15

Michigan v. Tucker, 417 U.S. 433 (1974)..... 12

Minnick v. Mississippi, 498 U.S. 146 (1990)..... 13

Miranda v. Arizona, 384 U.S. 436 (1966)..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 7, 11, 26, 27

New York v. Quarles, 467 U.S. 649 (1984)..... 26, 27

Oregon v. Elstad, 470 U.S. 298 (1985)..... 12, 26

Payne v. Arkansas, 356 U.S. 560 (1958) 14, 15, 21

Payne v. Tennessee, 501 U.S. 808 (1991)..... 6, 22

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 2, 6, 22

Reck v. Pate, 367 U.S. 433 (1961) 14, 15

Rhode Island v. Innis, 446 U.S. 291 (1980)..... 7, 26

Segura v. United States, 468 U.S. 796 (1984) 27, 28

Solem v. Stumes, 465 U.S. 638 (1984)..... 26

Spano v. New York, 360 U.S. 315 (1959)..... 14, 15, 21

Stein v. New York, 346 U.S. 156 (1953)..... 21

Thomas v. Arizona, 356 U.S. 390 (1958)..... 15, 21

Townsend v. Sain, 372 U.S. 293 (1963)..... 14

Turner v. Pennsylvania, 338 U.S. 62 (1949)..... 15

United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999)..... 4

United States v. Sharpe, 470 U.S. 675 (1985) 17

Vasquez v. Hillery, 474 U.S. 254 (1986)..... 5, 6, 22

Ward v. Texas, 316 U.S. 547 (1942)..... 14, 15

Watts v. Indiana, 338 U.S. 49 (1949)..... 14, 15

Withrow v. Williams, 507 U.S. 680 (1993)..... 26

Wan v. United States, 266 U.S. 1 (1924) 14, 15

Statutes

18 U.S.C. § 3501 ..... *passim*

Publications

Affirm "Miranda" Decision, St. Petersburg Times, Dec. 13, 1999..... 24

American Bar Association Special Committee on Criminal Justice in a Free Society, *Criminal Justice in Crisis* (1988)..... 8

Liva Baker, *Miranda: Crime, Law and Politics* (1985)..... 7

Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996)..... 8

David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999)..... 25

Court Should Protect Suspects' Rights, Atlanta Const., Dec. 16, 1999 23

Don't Mess with Miranda, Pittsburgh Post-Gazette, Dec. 12, 1999 24

Don't Revoke Miranda, The Herald (Rock Hill, S.C.), Dec. 8, 1999 23

Double Jeopardy for Miranda, Press-Enterprise (Riverside, Cal.), Dec. 9, 1999..... 24

T. Gibbons & J. Casey, *Ed Meese's War On Miranda Draws Scant Support*, Chicago Sun-Times, Feb. 17, 1987..... 10

High Court Should Leave Miranda Rule Alone, Arizona Republic, Dec. 15, 1999..... 23

J. Edgar Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175 (1952) 28

If Miranda Ain't Broke, Arizona Daily Star, Dec. 9, 1999 23

Keep Miranda, Press Democrat (Santa Rosa, Cal.), Dec. 9, 1999 24

Keep Reading them their Rights, USA Today, Dec. 8, 1999 24

Keep the Miranda Rule, Des Moines Register, Dec. 11, 1999 23

S. Kraske & T. Samuels, *Court to Review Miranda Issues But Area Police Say Ruling Fine As Is*, Kansas City Star, Dec. 7, 1999 9

Leave Miranda Alone in Old Age, Dayton Daily News, Dec. 10, 1999 23

B. Masters & T. Jackman, *Justice System Worries About 'Miranda,'* Wash. Post, Feb. 16, 1999..... 8

T. Mauro, *Undoing Tradition? Legal Renegade's Mission: Upend Enduring Decision*, USA Today, Mar. 1, 1999..... 9

Miranda Protects Against Abuses, Chicago Daily Herald, Dec. 10, 1999 23

Miranda Revisited, N.Y. Times, Dec. 7, 1999..... 24

Miranda Should Stand – Rights Warnings Improve Justice, Greensboro News & Record, Dec. 12, 1999 23

Miranda Under Assault, Hartford Courant, Dec. 27, 1999 23

Miranda Warnings – More Beneficial Than Not, San Francisco Chron., Dec. 8, 1999..... 24

Miranda Was, and Is, Sound, Omaha World-Herald, Dec. 10, 1999 24

Miranda's Right to Remain, Roanoke Times & World News, Dec. 8, 1999 24

No Need to Change Miranda Warnings, News Tribune (Tacoma, Wash.), Dec. 13, 1999 23

T. Ove, *Miranda Warning Facing Challenge in Supreme Court*, Pittsburgh Post-Gazette, Jan. 10, 2000 11

E. Paz-Martinez, *Police Chiefs Defend Miranda Decision Against Meese Threats*, Boston Globe, Feb. 5, 1987 10

Police Must Spell Out Suspects Rights, Seattle Post-Intelligencer, Dec. 8, 1999 24

Preserve "Miranda Rights," Providence Journal, Dec. 12, 1999 24

Preserving Miranda, Post-Standard (Syracuse, N.Y.), Dec. 10, 1999 24

Protecting Individual Dignity, St. Louis Post-Dispatch, Dec. 7, 1999 24

Protecting Miranda, Chicago Sun-Times, Dec. 8, 1999 23

Read 'em Their Rights: Miranda Ruling Should Remain Part of American Culture, Sarasota Herald-Tribune, Dec. 12, 1999 ..... 23, 24

Rights, Not Technicalities, Courier-Journal (Louisville, Ky.), Dec. 11, 1999 23

L. Rodriguez, *Attorneys Say Miranda Ideal As Is*, Houston Chron., Jan. 23, 1987 10

D. E. Rovella, *'Miranda' Upheaval Unlikely*, Nat'l L.J., Mar. 1, 1999 10

Save Miranda Decision – It's a Constitutional Right, Syracuse Herald-Journal, Dec. 8, 1999 24

Saving Miranda, Detroit News, Dec. 8, 1999 23

Self-Incrimination Save Miranda, Virginian-Pilot and Ledger-Star, Dec. 24, 1999 24

Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996) 8

Silent Right, The Columbian (Vancouver, Wash.), Dec. 10, 1999 23

B. Solomon, *Meese Sets Ambitious Agenda That Challenges Fundamental Legal Beliefs*, 17 Nat'l J. 2640 (Nov. 23, 1985) 9

Supreme Court Should Uphold Miranda Ruling, Portland Press Herald, Dec. 8, 1999 24

That Challenge to the Miranda Rule, Tampa Tribune, Dec. 8, 1999 24

The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions, Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary, 106th Cong. 1st Sess. (May 13, 1999) 8

The Folly of Junking Miranda, Chicago Tribune, Dec. 9, 1999 23

INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of numerous present and former federal, state and local law enforcement officers and prosecutors who share the view that *Miranda v. Arizona*, 384 U.S. 436 (1966) should not be overturned because it has become a fundamental part of our criminal justice system and because it promotes fair and effective law enforcement.[1]

SUMMARY OF ARGUMENT

Thirty-four years after this Court decided *Miranda v. Arizona*, and after this Court has decided dozens of cases elaborating its consequences and implications, the Court today faces the claim that *Miranda* should be overruled, and indeed that all of the many decisions based on it for over thirty years have lawlessly disregarded a congressional statute that supposedly supplanted it.

This remarkable effort to uproot one of the most familiar and fundamental of this Court's constitutional decisions about police procedures defies the basic precept of *stare decisis*. As the Court has recently observed, a constitutional decision, and particularly one that enforces and indeed has come to symbolize the liberties of our people, should only be overturned if it has proved to be "unworkable," has been "discounted by society," or has proved "irrelevant or unjustifiable in dealing with the issue it

---

[1] A list of the *amici* who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

addressed," and if overruling it would not undermine the "stability" fostered by the decision. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

As experienced prosecutors and law enforcement officials who have been active participants in law enforcement on every level since *Miranda* was decided, *amici* are particularly well placed to address whether the rule of *Miranda* has proved unworkable or harmful to law enforcement, and whether it has promoted stability and become embedded in the structure of the law and the consciousness of the public and law enforcement officers. In the case of *Miranda*, the standards for overruling established precedent manifestly have not been met.

First, far from proving impractical or destructive, *Miranda* has provided a clear, bright-line, easily enforceable rule governing the admission of statements obtained from defendants during custodial interrogation. Under *Miranda*, police officers and other law enforcement personnel are trained to follow a simple and consistent protocol in interrogating suspects, prosecutors can easily assess the admissibility of confessions, and judges are given a straightforward and objective standard to apply in reviewing the legality of interrogations. If the *Miranda* warnings are properly given, and the defendant nevertheless waives his rights and makes a statement, that statement will almost certainly be admissible, and an argument that it was coerced will rarely succeed. In sharp contrast, under the pre-*Miranda* regime that the decision below would restore, law enforcement personnel, prosecutors, the lower courts and even this Court faced a confusing, irreconcilable mass of *ad hoc* decisions based on judges' subjective assessments of the tactics followed by individual interrogators and the mental states of particular defendants.

Second, *Miranda* has withstood the test of time and become an established pillar of American law. Generations of law enforcement personnel have been trained and have operated under its standards. The decision has not hindered the dramatic improvements in law enforcement practices that have been achieved in recent years. Moreover, this Court has decided dozens of cases interpreting the rule of *Miranda*, without any suggestion that its authority has eroded or that its administration has become problematic. Rather than being "discounted by society," *Miranda* stands as the decision of this Court whose content is perhaps best known and most deeply accepted by the public. Every Hollywood crime drama and television police show that depicts an arrest shows the officer warning the arrestee of his rights in accordance with *Miranda*. Those warnings have become a symbol of the constitutional limits on arbitrary or coercive government authority.

To overrule a decision so firmly embedded in the case law and the public consciousness would not only bring the law into disrepute, but would surely send an unintended and destructive signal to the police and the public that fundamental rights themselves, and not merely the requirement that defendants be advised of them, have been repealed.

ARGUMENT

I. AFFIRMING THE CONSTITUTIONALITY OF SECTION 3501 WOULD REQUIRE OVERTURNING *MIRANDA*

In *Miranda v. Arizona*, this Court held that before conducting custodial interrogation of a criminal suspect, the police must provide the suspect with warnings concerning his constitutional right against self-incrimination, and the

suspect must waive those rights. 384 U.S. at 444. For all the reasons set forth in the Brief for the United States on Petition for Writ of Certiorari, we agree with the United States that the holding of *Miranda* is rooted in the Constitution.

We also agree with the United States that 18 U.S.C. § 3501 could only be constitutional if this Court were to overrule *Miranda*. *Miranda*'s requirements were expressly based upon the conclusion that, in view of the inherently coercive effects of custodial interrogation, some form of warning was necessary to protect a defendant's Fifth Amendment rights. *See* 384 U.S. at 466. While the Court made clear in *Miranda* that the precise warning regime that it prescribed was not itself a constitutional right, the Court held: "Congress and the States are free to develop their own safeguards for the privilege, *so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.*" *Id.* at 490 (emphasis added). Section 3501 simply does not satisfy this requirement because it does not provide any system whatsoever for informing suspects of their rights. Rather than accepting the Court's invitation to devise an alternative method for informing suspects of their rights, Section 3501 purports to overrule *Miranda* by making admissible any statement that under "all the circumstances" can be considered "voluntary," even if the defendant was unaware of his right to silence and his right to have counsel present during the interrogation. 18 U.S.C. § 3501(a) & (b).[2]

[2] Indeed, the Fourth Circuit below had no trouble concluding that, "[b]ased upon the statutory language, it is perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda*." *United States v. Dickerson*, 166 F.3d 667, 686 (4th Cir. 1999). Of course, if, as the United States has established, *Miranda* is constitutionally based, only this Court, not Congress, has the power to overrule it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Section 3501 thus attempts to restore the situation that existed before *Miranda*, the very situation that this Court held was inconsistent with the rights guaranteed by the Constitution.

In short, because Section 3501 does not satisfy the requirements set forth in *Miranda*, and because *Miranda* is based in the Constitution, this Court can only uphold Section 3501 if it overrules *Miranda*. Although some of the current and former law enforcement officers and prosecutors joining this brief believe that certain aspects of the *Miranda* line of cases might bear reconsideration, all of us join in urging this Court to reaffirm the core holding of *Miranda*, and to reject the Congressional effort to overrule it legislatively.

II. BECAUSE THE *MIRANDA* RULE DOES NOT HAMPER EFFECTIVE LAW ENFORCEMENT AND IS DEEPLY ROOTED IN COMMUNITY EXPECTATIONS, THE PRINCIPLE OF *STARE DECISIS* STRONGLY COUNSELS AGAINST OVERRULING *MIRANDA*

As this Court has noted, the doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). There can be little doubt that society at large considers *Miranda* to be a "bedrock" principle of law. Indeed, there are few cases that loom so large in the public's consciousness. This Court can only justify overturning

Miranda and the settled expectations that have grown up around it if that decision has proved to be "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Id.* at 266. *See also Casey*, 505 U.S. at 854-55 (prior decision should be overruled only if it has proved to be "unworkable," has been "discounted by society," has proved "irrelevant or unjustifiable in dealing with the issue it addressed," and if overruling it would not undermine the "stability" fostered by the decision); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *California v. Acevedo*, 500 U.S. 565, 579 (1991) ("[T]his Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or has been a derelict or led to anomalous results.").

Application of these principles requires that *Miranda* not be overruled. On the contrary, these principles strongly support the reaffirmation of its core holding. *First*, its requirements have proved to be eminently "workable." *Second*, overruling *Miranda* would disrupt important settled expectations of the public and of law enforcement about our criminal justice system.

A. Far from Being "Outdated, Ill-Founded or Unworkable," the *Miranda* Warnings Promote Effective Law Enforcement

In the thirty-four years since *Miranda* became the law of the land, the local, state and federal institutions responsible for enforcing the nation's criminal laws have developed an invaluable body of experience in how to detect, investigate and prosecute crimes within the constitutional

guidelines set forth in *Miranda*. Although initially the *Miranda* decision necessarily required some changes in certain law enforcement and prosecutorial practices, the historical record supports the conclusion already evident to Chief Justice Burger twenty years ago, that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

By its very nature, *Miranda* occasionally results in the exclusion of evidence that supports a criminal conviction. It is our considered view, based on our wide-ranging personal experience in law enforcement, that the occasional adverse impact in individual cases is far outweighed by the systemic benefits *Miranda* provides to the functioning of our criminal justice system.[3] *Miranda* was self-consciously an "attempt[] to reconcile" competing concerns: to allow law enforcement agents to conduct interrogations and gather evidence of criminal wrongdoing while promoting the integrity of the investigative process and ensuring respect for a suspect's constitutional rights. *Moran v. Burbine*, 475 U.S. 412, 426-27 (1986). We strongly believe that *Miranda* strikes an appropriate balance and does far more to promote effective law enforcement than to undermine it.

We recognize that some of our law enforcement colleagues have indicated their support for Section 3501. We nonetheless believe that our views concerning the effects

---

[3] The adverse effects of *Miranda* even on particular cases is often overstated. Many defendants can be convicted without confession evidence. Indeed, after *Miranda* was remanded, Ernesto Miranda was convicted on re-trial and remained in prison until December 1972. *See* Liva Baker, *Miranda: Crime, Law and Politics* 193 & 381 (1985).

of *Miranda* reflect a widely shared view among those in institutions responsible for enforcing the criminal laws that *Miranda* promotes effective law enforcement.[4] As a survey of law enforcement officials performed by a blue-ribbon commission of the American Bar Association concluded in 1988, "[a] very strong majority of those surveyed – prosecutors, judges, and police officers – agree that compliance with *Miranda* does not present serious problems for law enforcement." American Bar Association Special Committee on Criminal Justice in a Free Society, *Criminal Justice in Crisis* 28 (1988). The following is just a small sample of the wide variety of law enforcement officials and prosecutors who have publicly stated that they support *Miranda*:

- Charles E. Moylan, former Baltimore State's Attorney: "Every prosecutor in the country hated *Miranda* the day it came down . . . but after a decade, even those who were strongly pro-state had come to the conclusion, 'Hey, we can live with this.' . . . It would be chaos to ever go back."[5]

---

[4] Criticisms of *Miranda* have generally been based on anecdotal, and occasionally statistical, claims about *Miranda*'s impact. *See, e.g.*, Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996); *The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions, Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. 1st Sess. (May 13, 1999) (statement of Gilbert G. Gallegos). These claims do not comport with our experience as law enforcement agents and prosecutors, and their validity has been persuasively attacked. *See, e.g.*, Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996).

[5] Brooke A. Masters & Tom Jackman, *Justice System Worries About 'Miranda,'* Wash. Post, Feb. 16, 1999, at B1.

- Gene Cromartie, International Association of Chiefs of Police: "[*Miranda* is] ingrained in everything we do." Overturning *Miranda* would "open up a Pandora's box. Why take a chance? It's not a big effort to read someone their rights."[6]

- Chris Koster, Cass County, Missouri Prosecutor: "There's nothing more important than making sure people in law enforcement are viewed as the good guys. To go back to the days prior to *Miranda* puts our credibility at risk, and no one wants to go in that direction."[7]

- Rudolph W. Giuliani, Mayor of New York City and former United States Attorney: "I generally don't think we should change things unless there's a terribly good reason to do so. There's a real benefit in keeping things stable."[8]

- David Fogel, Chicago Police Department Office of Professional Standards: "We're all for *Miranda* warnings . . . the cost is infinitesimally small compared

---

[6] Tony Mauro, *Undoing Tradition? Legal Renegade's Mission: Upend Enduring Decision*, USA Today, Mar. 1, 1999, at 1A.

[7] Steve Kraske & Tanyanika Samuels, *Court to Review Miranda Issues But Area Police Say Ruling Fine As Is*, Kansas City Star, Dec. 7, 1999, at A1.

[8] Burt Solomon, *Meese Sets Ambitious Agenda That Challenges Fundamental Legal Beliefs*, 17 Nat'l J. 2640 (Nov. 23, 1985).

to living in a democratic society where you don't give warnings and you can't seize evidence illegally."[9]

- John B. Holmes, Jr., Harris County, Texas District Attorney: "Over the years [police and prosecutors have] come to understand, follow and apply the [*Miranda*] rule. And I don't think it is the terrible thing we thought it was. We still get as many confessions as we ever did, and we still get as much evidence."[10]

- John R. Justice, Solicitor for the Sixth Circuit, Chester, South Carolina & President, National District Attorneys Association: "*Miranda* has not been the devastating death blow to law enforcement that people back in the '60s thought it was going to be . . . *Miranda* is an extension of the Fifth Amendment . . . ."[11]

- Francis M. Roche, former Boston Police Commissioner: "*Miranda* made us more professional. It forced us to appreciate the Constitution. We now have great respect for people and we want to protect those rights."[12]

- Thomas Sturgeon, Allegheny County, Pennsylvania Police Superintendent: "Police have been successful in

[9] Tom Gibbons & Jim Casey, *Ed Meese's War On Miranda Draws Scant Support*, Chicago Sun-Times, Feb. 17, 1987, at 41.

[10] Lori Rodriguez, *Attorneys Say Miranda Ideal As Is*, Houston Chron., Jan. 23, 1987, at 23.

[11] David E. Rovella, *'Miranda' Upheaval Unlikely*, Nat'l L.J., Mar. 1, 1999, at A1.

[12] Eduardo Paz-Martinez, *Police Chiefs Defend Miranda Decision Against Meese Threats*, Boston Globe, Feb. 5, 1987, at 25.

solving crimes with the *Miranda* rights in place . . . I think to just eliminate the *Miranda* warning would probably bring more scrutiny and mistrust against the police. So I think they should leave it the way it is."[13]

Moreover, *Miranda*'s workability is confirmed by the fact that "with limited exceptions [Section 3501] has been studiously ignored by every administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." *Davis v. United States*, 512 U.S. 452, 463-64 (1994) (Scalia, J., concurring). Similarly, no state has accepted the Supreme Court's invitation to devise an alternative to *Miranda*'s warnings. If *Miranda* were unworkable, surely some Department of Justice would have advanced Section 3501 before this Court, or some state would have pressed this Court to accept a similar statutory framework.

1. *Miranda* Provides Bright Lines for Law Enforcement to Follow

For the law enforcement officer questioning a suspect, *Miranda* provides an easy and effective guide to compliance with constitutional limits. As this Court has "stressed on numerous occasions, one of the principal advantages of *Miranda* is the ease and clarity of its application." *Moran*, 475 U.S. at 425 (quotations omitted). "[R]igidity [i]s the strength of the [*Miranda*] decision. It afford[s] police and courts clear guidance on the manner in which to conduct a custodial investigation . . . ." *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers).

[13] Torsten Ove, *Miranda Warning Facing Challenge in Supreme Court*, Pittsburgh Post-Gazette, Jan. 10, 2000, at A-1.

Miranda establishes a set of bright-line rules that are easy for police officers and agents to understand and apply to ensure that a confession will be admissible in the government's case-in-chief. For police officers and law enforcement personnel in the line of duty, the clarity of these rules is paramount. Under the pressures of conducting an investigation, "[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions . . ." *Oregon v. Elstad*, 470 U.S. 298, 316 (1985). The clear procedures set by *Miranda* significantly simplify the calculus that a police officer in the line of duty must perform. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 443 (1974) (the *Miranda* rules "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost"). Moreover, *Miranda* considerably facilitates the training of law enforcement in interrogation procedures. Generations of officers have been trained on one simple litany: Before custodial interrogation begins, provide the *Miranda* warnings; if the right to remain silent or for counsel is asserted, cease questioning.

Miranda also promotes judicial respect for the many complex and delicately balanced decisions that law enforcement agents make during interrogations. *Miranda*'s requirements can be objectively assessed not only by the police officer conducting the interrogation, *but also by the court reviewing it*. The primary questions for the court are simple: Have the warnings been provided and have the rights been waived? The objective nature of this assessment lessens the need for intrusive judicial scrutiny of the conduct and state of mind of the suspect or the police officer conducting the interrogation. Once the court determines that there have been proper warnings and waiver, in all but the most exceptional cases, there is no need, and little room, for further judicial second-guessing of the interrogation. *See,*

e.g., Minnick v. Mississippi, 498 U.S. 146, 151 (1990) (*Miranda*'s holding "'has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation . . .'") (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)). The fact that warnings have been provided radically truncates potential challenges to admission of a confession. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare").

This is in stark contrast to pre-*Miranda* law, to which the Fourth Circuit's decision would return law enforcement. The pre-*Miranda* "voluntariness" standard has none of the virtues of the bright-line rule, and imposed significant burdens on law enforcement for three distinct reasons:

1. *The Voluntariness Standard Encompasses an Unreasonable Number of Factors for Law Enforcement Agents to Assess*: Under Section 3501, the admissibility of a confession turns on whether the confession is "voluntary" in light of "all the circumstances." 18 U.S.C. § 3501(b). It is difficult to conceive how law enforcement agencies could effectively or efficiently train officers how to make *ex ante* assessments on the street or in the stationhouse that their interrogation techniques will lead to a "voluntary" confession. Indeed, the pre-*Miranda* experience makes prediction unnecessary: we already know that courts enumerated an almost limitless number of potentially relevant factors in this determination. In the margin, we set forth over twenty distinct factors that this Court alone, prior

to *Miranda*, held might bear on the voluntariness inquiry.[14] In light of this multiplicity of factors, a police officer may

[14] Aside from physical violence, our review has identified the following factors from this Court's pre-*Miranda* case law: (1) length of the interrogation, *see, e.g., Davis v. North Carolina*, 384 U.S. 737 (1966), *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), *Chambers v. Florida*, 309 U.S. 227 (1940); (2) location of interrogation and disorientation of defendant, *see, e.g., Davis*, 384 U.S. 737, *Reck v. Pate*, 367 U.S. 433 (1961), *Ward v. Texas*, 316 U.S. 547 (1942); (3) continuity in interrogation, *see, e.g., Leyra v. Denno*, 347 U.S. 556 (1954), *Harris v. South Carolina*, 338 U.S. 68 (1949), *Watts v. Indiana*, 338 U.S. 49 (1949), *Ashcraft*, 322 U.S. 143; (4) defendant's maturity, *see, e.g., Gallegos v. Colorado*, 370 U.S. 49 (1962), *Haley v. Ohio*, 332 U.S. 596 (1948); (5) defendant's education level, *see, e.g., Crooker v. California*, 357 U.S. 433 (1958), *Payne v. Arkansas*, 356 U.S. 560 (1958), *Harris*, 338 U.S. 68; (6) defendant's physical condition or illness, *see, e.g., Greenwald v. Wisconsin*, 390 U.S. 519 (1968), *Townsend v. Sain*, 372 U.S. 293 (1963), *Wan v. United States*, 266 U.S. 1 (1924); (7) defendant's mental health, *see, e.g., Blackburn v. Alabama*, 361 U.S. 199 (1960), *Spano v. New York*, 360 U.S. 315 (1959), *Fikes v. Alabama*, 352 U.S. 191 (1957); (8) defendant's intelligence, *see, e.g., Reck*, 367 U.S. 433, *Crooker*, 357 U.S. 433, *Fikes*, 352 U.S. 191; (9) defendant's formal legal training, *see, e.g., Crooker*, 357 U.S. 433; (10) whether defendant speaks English, *see, e.g., Gallegos v. Nebraska*, 342 U.S. 55 (1951); (11) inconsistencies in consecutive confessions, *see, e.g., Clewis v. Texas*, 386 U.S. 707 (1967); (12) whether defendant has been subjected to travel, *see, e.g., Clewis*, 386 U.S. 707, *Spano*, 360 U.S. 315, *Ward*, 316 U.S. 547; (13) whether defendant has been deprived of medications or medical attention, *see, e.g., Greenwald*, 390 U.S. 519, *Reck*, 367 U.S. 433, *Leyra*, 347 U.S. 556; (14) whether defendant has been deprived of food, *see, e.g., Davis*, 384 U.S. 737, *Reck*, 367 U.S. 433, *Payne*, 356 U.S. 560; (15) whether defendant was stripped of clothing, *see, e.g., Malinski v. New York*, 324 U.S. 401 (1945), *Bram v. United States*, 168 U.S. 532 (1897); (16) physical conditions of the interrogation room, *see, e.g., Blackburn*, 361 U.S. 199, *Ward*, 316 U.S. 547; (17) use of trickery or deception by the interrogators, *see, e.g., Spano*, 360 U.S. 315, *Leyra*, 347 U.S. 556; (18) use of multiple inquisitors questioning in "relay," *see, e.g., Spano*, 360 U.S. 315, *Harris*, 338 U.S. 68, *Ashcraft*, 322 U.S. 143; (19) whether defendant was sleep-deprived, *see, e.g., Leyra*, 347 U.S. 556, *Watts*, 338 U.S. 49, *Ashcraft*, 322 U.S. 143, *Chambers*, 309 U.S. 227; (20) whether defendant was inappropriately threatened, *see, e.g., Lynumn v. Illinois*, 372 U.S. 528 (1963) (custody of children), *Payne*, 356 U.S. 560 (mob violence), *Thomas v. Arizona*, 356 U.S. 390 (1958) (mob violence), *Harris*, 338 U.S. 68 (harassment of family members), *Ward*, 316 U.S. 547 (mob violence); (21) the length of time defendant was held *incommunicado* or in isolation, *see, e.g., Haynes v. Washington*, 373 U.S. 503 (1963), *Reck*, 367 U.S. 433, *Payne*, 356 U.S. 560, *Watts*, 338 U.S. 49; (22) whether defendant was subjected to physical hardship, *see, e.g., Davis*, 384 U.S. 737, *Wan*, 266 U.S. 1; (23) whether defendant was advised of rights to remain silent or of right to counsel, *see, e.g., Davis*, 384 U.S. 737, *Haynes*, 373 U.S. 503, *Mallory v. United States*, 354 U.S. 449 (1957), *Turner v. Pennsylvania*, 338 U.S. 62 (1949); (24) whether defendant's request to speak to a lawyer was granted, *see, e.g., Greenwald*, 390 U.S. 519, *Haynes*, 373 U.S. 503, *Spano*, 360 U.S. 315; (25) whether defendant was detained before arraignment, *see, e.g., Mallory*, 354 U.S. 449, *Turner*, 338 U.S. 62; (26) whether pre-trial detention violates state law, *see, e.g., Fikes*, 352 U.S. 191, *Watts*, 338 U.S. 49, *Ward*, 316 U.S. 547. In many of the pre-*Miranda* decisions, several different combinations of factors were assessed in order to determine the voluntariness of the confession.

know under 18 U.S.C. § 3501 that there may be some eventual courtroom benefit in providing warnings, but has no way of knowing for certain what effect providing the warnings – or anything else that happens during the interrogation – will have on the admissibility of any particular statement made by the suspect. *See* 18 U.S.C. § 3501(b) ("The presence or absence of any of the above-mentioned factors . . . need not be conclusive"). In short, police officers will be uncertain what is expected of them. If the officer guesses wrong, under Section 3501, the trial judge will be required to suppress the confession.

2. *The Voluntariness Standard Reopens Difficult Assessments of the Suspect's State of Mind*: Under the constitutional framework governing interrogations before *Miranda*, admissibility of a suspect's statement frequently turned on highly detailed and subjective judicial fact-finding about the state of the defendant's mind and the trial court's

weighing of the coercive impact of the interrogator's tactics on that particular arrestee. These decisions frequently turned on judicial assumptions as to what a suspect subjectively understood under the circumstances of the interrogation.[15] For reasons long recognized by this Court, it was exceedingly difficult for a police officer to anticipate during an interrogation what techniques might be over the line for a particular suspect. *See, e.g., Culombe v. Connecticut*, 367 U.S. at 604-05 (Frankfurter, J.) ("The notion of 'voluntariness' is itself an amphibian.").

Although this Court has prudently pared back the inquiry into a suspect's subjective state of mind in determining the admissibility of a statement where warnings have been provided, *see Colorado v. Connelly*, 479 U.S. 157, 164 (1986), overturning *Miranda* would invite trial courts to reopen the broad inquiries typical of pre-*Miranda* cases, where courts would delve into the suspect's state of mind – and even more problematically – the police officer's understanding of the suspect's state of mind.

3. *The Voluntariness Standard Invites Ad Hoc Scrutiny of Police Tactics*: The wide-ranging scope of voluntariness determinations will inevitably lead to an equally wide-ranging judicial second-guessing of police tactics. Particularly in light of the *Miranda* Court's correct observation that stationhouse interrogation involves "inherently compelling pressures," 384 U.S. at 467, without *Miranda* warnings, trial courts will explore, in a broader class of cases, whether the suspect's decision to talk was truly voluntary. Some of these courts can be expected to scrutinize carefully and skeptically the conduct and tactics of

[15] *See, e.g., Haynes*, 373 U.S. 503; *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Blackburn*, 361 U.S. 199; *Crooker*, 357 U.S. 433.

the interrogator. Aside from keeping police officers off their beats and in the witness chair, enhanced scrutiny in this area will likely lead to judicial decisions, made in the removed comfort of a courtroom, which unfairly and improperly criticize police conduct that were reasonable responses to rapidly unfolding situations. *Cf. United States v. Sharpe*, 470 U.S. 675, 686 (1985) (when "the police are acting in a swiftly developing situation . . . the court should not indulge in unrealistic second-guessing. . . . A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished").

Moreover, because the determination concerning voluntariness is an inherently subjective finding of fact about the interplay of the mental state of a defendant and the conduct of the police officer, whose demeanors will both be assessed by the individual trial judge, the same interrogation can be expected to lead to different decisions depending on the experience and attitudes of the particular judge who hears the case, and appellate courts will have little ability to promote consistency or control aberrant decisions.[16] The invitation to judicial second-guessing of police tactics would be bad enough if it led to courts' invalidating useful interrogation techniques; it will be far worse that the judicial intrusions will not even produce clear or consistent rules about what is or is not allowed.

* * *

Undoubtedly, many law enforcement agencies may address this uncertainty by continuing to require their officers to provide *Miranda* or similar warnings through

[16] *See infra* note 18.

internal regulations. The possibility of such voluntary implementation may, at least in part, explain the willingness of some law enforcement organizations to support Section 3501.[17]

In our view, a voluntary regime of warnings has several obvious flaws. *First*, overruling *Miranda* would end uniformity in interrogation procedures. Even for those departments that adopt warnings, there would undoubtedly be periodic alteration and variation in the warnings over time. Aside from the extensive (and potentially endless) litigation likely to ensue over the effect of any given set of alternative warnings, constant tinkering with the warnings would inevitably make the policies harder to follow and undermine compliance. *Cf. Colorado v. Bertine*, 479 U.S. 367, 375 (1987) ("[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.") (citation omitted). *Second*, there is no guarantee that internal regulations will be as effective as *Miranda* in encouraging police to administer warnings, because under purely internal regulations the prosecutor's evidentiary interest in assuring that warnings have been provided will become attenuated. Moreover, while we hope that most professional and effective law enforcement agencies would continue to require their officers to give some form of warning (as the Federal Bureau of Investigation did long before *Miranda* was decided), some police agencies may short-sightedly dispense with warnings and adopt more aggressive interrogation techniques. These techniques could go up to and over the line of constitutional coerciveness,

---

[17] *See, e.g.*, Brief of *Amici Curiae* Americans for Effective Law Enforcement, *et al.*, at 4.

presenting courts with difficult *ad hoc* decisions on the voluntariness of confessions extracted without due regard for the suspect's rights. The likelihood that some departments will drop warnings altogether can only be expected to grow as the memory of the value of *Miranda* fades.

2. *Miranda* Assists in Securing Convictions of the Guilty

For prosecutors, *Miranda* provides a valuable tool in securing and expediting convictions of those who commit crimes. Once a case moves from investigation to prosecution, *Miranda*'s clear rules make it relatively easy for prosecutors to predict the outcome of a suppression hearing and accurately assess the evidentiary strength of the case shortly after arrest. As noted *supra* at 12-13, the *Miranda* rules emphasize a limited number of objective factors, such as whether the warnings were provided. This makes the standard very easy to litigate, and provides prosecutors with a reasonably reliable way of predicting the outcome of suppression hearings. Assuming that a suspect is in custody at the start of interrogation, either the warnings were given and a waiver was obtained, or they were not.

In light of the heavy caseloads many prosecutors face, the clarity of the *Miranda* rules also helps conserve prosecutorial resources by facilitating negotiated dispositions. A defendant who knows that *Miranda* warnings were properly administered is less likely to waste time with a suppression motion. Even if there is a suppression hearing, a prosecutor will have a strong sense *prior* to the hearing whether the statement of the suspect will be admitted. *See, e.g., Fare v. Michael C.*, 442 U.S. at 717 ("*Miranda*'s holding has the virtue of informing police and prosecutors . . . under what circumstances statements obtained during such interrogation are not admissible"). In

the event that there is some problem with use of the suspect's statement, the prosecutor is able to advise the police – before a suppression hearing – that it might be necessary to gather supplemental evidence. Moreover, since both the prosecutor and a defendant have a clear picture at the outset of the prosecution whether a confession will be admitted, plea bargaining may be facilitated.

In short, *Miranda* has made what previously was a difficult fact-sensitive litigation issue quite manageable. When the government can show that *Miranda* warnings were properly given, it not only satisfies an initial legal requirement; it also provides judges with compelling evidence of good faith and adherence to the rule of law. The result in such cases is that what otherwise could be a open-ended inquiry into voluntariness becomes simple and expeditious. *See, e.g., Berkemer*, 468 U.S. at 433 n.20 ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). Although a defendant is constitutionally permitted to present evidence concerning the circumstances of an interrogation to a jury, *see Crane v. Kentucky*, 476 U.S. 683 (1986), the administration of *Miranda* warnings greatly reduces the likelihood that any given trial will become side-tracked on collateral issues concerning the circumstances under which a confession was obtained. Indeed, the overwhelming familiarity of Americans with *Miranda* warnings doubtless increases the weight that jurors give to statements obtained after a defendant was properly advised of them.

The contrast with the "totality of the circumstances" voluntariness approach required by Section 3501 could not be starker. The very factors enumerated in Section 3501, and this Court's pre-*Miranda* decisions, dramatically

establish the difference between litigating under the objective and certain rules of *Miranda* and the subjective, unpredictable and *ad hoc* determination of "voluntariness." Because of the virtually limitless number of factors that contribute to the determination whether the statements of a defendant are voluntary under all of the circumstances, eliminating *Miranda* will significantly complicate a prosecutor's assessment of the case, undermining plea bargaining and introducing increased risk at trial. *See supra* note 14.

The risk of uncertainty for prosecutors cannot be overstated. There is no clearer way to illustrate the difficulty prosecutors would face in addressing confessions under Section 3501 than by looking at the dramatic inconsistencies in this Court's jurisprudence on confessions prior to *Miranda*.[18] There is a significant downside to reintroducing

---

[18] A number of pre-*Miranda* decisions appear to have reached inconsistent outcomes for similarly situated defendants and have created confusion over the weight to be given any particular factor. *Compare Cicenia v. La Gay*, 357 U.S. 504 (1958) (confession admitted after police refuse request to confer with counsel) *and Crooker*, 357 U.S. 433 (same) *with Spano*, 360 U.S. 315 (confession suppressed after police refuse request to confer with counsel) *and Haynes*, 373 U.S. 503 (same). *Compare Stein v. New York*, 346 U.S. 156 (1953) (confession admitted after 12 hours of "relay" interrogation) *with Haynes*, 373 U.S. 503 (confession suppressed after 16 hours of "relay" interrogation). *Compare Brown v. Allen*, 344 U.S. 443 (1953) (confession admitted after eighteen days of interrogation) *with Chambers*, 309 U.S. 227 (confession suppressed when obtained after five days of interrogation). *Compare Thomas v. Arizona*, 356 U.S. 390 (confession admitted where lynching threatened) *with Payne v. Arkansas*, 356 U.S. 560 (1958) (confession suppressed where lynching threatened). *Compare Lisenba v. California*, 314 U.S. 219 (1941) (confession admitted where suspect interrogated constantly for two days without sleep) *with Ashcraft*, 322 U.S. 143, 154 (confession suppressed after suspect subjected to continuous interrogation for thirty-six hours without sleep). These cases

an *ad hoc* approach to defining a vague standard in what is otherwise a relatively settled area of law. How are prosecutors to anticipate what factors any given court will choose to emphasize on any given day? In light of the importance of the interests at issue, this level of uncertainty would undermine effective law enforcement.

B. Settled Community Expectations Weigh Heavily Against Overturning *Miranda*

As noted above, this Court has repeatedly admonished that society's faith in our legal system depends upon consistent application of the prior decisions of this Court. *See Payne*, 501 U.S. at 827; *Vasquez*, 474 U.S. at 265-66. Departure from *Miranda* at this time not only would eliminate a pillar of the law enforcement system that has been eminently workable, but also would undermine the confidence and settled expectations of both the public at large and the law enforcement community about an important element of our criminal justice system. This Court has held that respect for such settled expectations and for stability is "indispensable" to "the rule of law underlying our own Constitution." *Casey*, 505 U.S. at 854. Accordingly, this Court should depart from *Miranda* only if it has been "discounted by society" or if it has become "irrelevant or unjustifiable in dealing with the issue it addressed." *Id.* at 855.

In the case of the criminal justice system, it is difficult to conceive of a legal principle that is more accepted by the public and embedded in the procedures of law enforcement than *Miranda*. Overturning *Miranda* would

---

demonstrate the difficulty in attempting to assess the importance of any single, given factor when a court is required to assess the totality of the circumstances.

suggest that the administration of justice is subject to the shifting currents of this Court's membership and the policy preferences of its members. To the public and to the law enforcement community, changing the basic *Miranda* regimen would create the appearance that successive Courts are imposing their varying ideas of social justice on the country – not evenhandedly applying well-established law.

1. The Public Has Accepted and Developed Strong Expectations About *Miranda*

As one commentator has noted, "[t]he *Miranda* warning has become an accepted part of American culture." *Read 'em Their Rights: Miranda Ruling Should Remain Part of American Culture*, Sarasota Herald-Tribune, Dec. 12, 1999, at 2F. Another has observed, "*Miranda* not only has become one of the best-known principles of the U.S. legal system, it also has become an anchor of justice." *Protecting Miranda*, Chicago Sun-Times, Dec. 8, 1999, at 51. Clearly its warnings have permeated our mass culture.[19] One need

---

[19] The flurry of editorials in support of *Miranda* published throughout the country in the weeks following the grant of *certiorari* in this case speak to *Miranda*'s deep permeation of our culture. *See, e.g., If Miranda Ain't Broke . . .*, Arizona Daily Star, Dec. 9, 1999, at 22A; *High Court Should Leave Miranda Rule Alone*, Arizona Republic, Dec. 15, 1999, at B8; *Court Should Protect Suspects' Rights*, Atlanta Const., Dec. 16, 1999, at A26; *Miranda Protects Against Abuses*, Chicago Daily Herald, Dec. 10, 1999, at 14; *Protecting Miranda*, Chicago Sun-Times, Dec. 8, 1999, at 51; *The Folly of Junking Miranda*, Chicago Tribune, Dec. 9, 1999, at 28; *Silent Right*, The Columbian (Vancouver, Wash.), Dec. 10, 1999, at A10; *Rights, Not Technicalities*, Courier-Journal (Louisville, Ky.), Dec. 11, 1999, at 10A; *Leave Miranda Alone in Old Age*, Dayton Daily News, Dec. 10, 1999, at 14A; *Keep the Miranda Rule – It is Imbedded in Americans' Concept of Justice. Why Throw it Out?*, Des Moines Register, Dec. 11, 1999, at 8; *Saving Miranda*, Detroit News, Dec. 8, 1999, at A10; *Miranda Should Stand – Rights Warnings Improve Justice*, Greensboro News & Record, Dec. 12, 1999, at H2; *Miranda Under Assault*, Hartford Courant, Dec. 27, 1999, at A10; *Don't Revoke*

look no further than the reading of *Miranda* rights in every arrest depicted on television and in movies to understand this basic fact. Indeed, to many Americans, these warnings embody the very idea of constitutional restraint on police action.

A retreat from these warnings might lead many to believe that they had lost underlying rights, and it would surely undermine public confidence in the security of basic legal protections. Overturning *Miranda* would also send a strong message that this Court no longer believes that effective law enforcement is compatible with informing suspects of their basic constitutional rights. Such a message

---

Miranda, The Herald (Rock Hill, S.C.), Dec. 8, 1999, at 9A; *No Need to Change Miranda Warnings*, News Tribune (Tacoma, Wash.), Dec. 13, 1999, at A8; *Miranda Revisited*, N.Y. Times, Dec. 7, 1999, at A22; *Miranda Was, and Is, Sound*, Omaha World-Herald, Dec. 10, 1999, at 26; *Don't Mess with Miranda – Supreme Court Should Uphold its Original Ruling*, Pittsburgh Post-Gazette, Dec. 12, 1999, at E2; *Supreme Court Should Uphold Miranda Ruling*, Portland Press Herald, Dec. 8, 1999, at 8A; *Preserving Miranda – A Measure Prompted by a History of Abuse of Suspects is Suddenly at Risk*, Post-Standard (Syracuse, N.Y.), Dec. 10, 1999, at A14; *Keep Miranda*, Press Democrat (Santa Rosa, Cal.), Dec. 9, 1999, at B6; *Double Jeopardy for Miranda*, Press-Enterprise (Riverside, Cal.), Dec. 9, 1999, at A14; *Preserve "Miranda Rights,"* Providence Journal, Dec. 12, 1999, at F14; *Miranda's Right to Remain*, Roanoke Times & World News, Dec. 8, 1999, at A12; *Miranda Warnings – More Beneficial Than Not*, San Francisco Chron., Dec. 8, 1999, at A28; *Read 'em Their Rights – Miranda Ruling Should Remain Part of American Culture*, Sarasota Herald-Tribune, Dec. 12, 1999, at 2F; *Police Must Spell Out Suspects Rights*, Seattle Post-Intelligencer, Dec. 8, 1999, at A12; *Protecting Individual Dignity*, St. Louis Post-Dispatch, Dec. 7, 1999, at B14; *Affirm "Miranda" Decision*, St. Petersburg Times, Dec. 13, 1999, at 10A; *Save Miranda Decision – It's a Constitutional Right*, Syracuse Herald-Journal, Dec. 8, 1999, at A12; *That Challenge to the Miranda Rule*, Tampa Tribune, Dec. 8, 1999, at 12; *Keep Reading them their Rights*, USA Today, Dec. 8, 1999, at 30A; *Self-Incrimination Save Miranda*, Virginian-Pilot and Ledger-Star, Dec. 24, 1999, at B8.

would further erode confidence in law enforcement, and in its ability to reconcile the goal of crime control with the rule of law.

This loss of confidence would have adverse consequences for the criminal justice system. Law enforcement depends upon the public at large to serve as witnesses, to cooperate with investigations, to act responsibly when appointed as jurors, and generally to respect the authority of law enforcement agents. Any lessening of public faith in the manner in which investigations are conducted could undermine this essential cooperation.

Moreover, *Miranda* provides a fundamental safeguard to indigent and uneducated suspects. Wealthy and well-educated suspects often know how to exercise their rights because they have the benefit of counsel. Indigent suspects, on the other hand, often do not. *Miranda* tends to address this inequity by informing indigent defendants of their rights and by expressly offering a lawyer to those defendants. Many have claimed that our criminal justice system is unfair because it discriminates against the poor. *See, e.g.*, David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999). Overturning *Miranda* would doubtless provide further support to those who attack the legitimacy of the criminal justice system on this basis.

Finally, overruling *Miranda* would require the Court to uproot dozens of decisions that have followed it over the years. In the thirty-four years since *Miranda* was decided, no opinion of this Court has ever questioned its validity. On the contrary, the Court has repeatedly reaffirmed and followed the decision, never once suggesting that there was any possibility that Congress had effectively overruled it

shortly after it was decided. The Court has again and again returned to the decision to elaborate its meaning, and to extend or refine its reasoning and consequences.[20] Whether or not each and every one of those cases was correctly decided (and some signers of this brief believe that some were not), to overrule *Miranda* would uproot not merely a single case – important as this single case is in the minds of the public and law enforcement officers as a symbol of enlightened law enforcement and respect for constitutional rights – but overturn in a single blow an entire branch of jurisprudence, on whose validity and integrity this Court has never cast the slightest doubt. The inevitable public perception that well-established decisions of this Court will be capriciously overturned based on the policy preferences of its changing members could gravely damage the dignity of the law.

2. Law Enforcement Has Developed Settled Expectations Concerning *Miranda*

As described in Section II.A above, law enforcement has very effectively integrated *Miranda* into its procedures.

---

[20] *See, e.g., Davis v. United States*, 512 U.S. 452; *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) ("We have repeatedly emphasized the virtues of a bright-line rule in cases following . . . *Miranda*."); *Moran*, 475 U.S. 412; *Elstad*, 470 U.S. at 317 ("The Court today in no way retreats from the bright-line rule of *Miranda*."); *Berkemer*, 468 U.S. at 429 ("In the years since the decision in *Miranda*, we have frequently reaffirmed the central principles established by that case . . . ."); *New York v. Quarles*, 467 U.S. 649 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Innis*, 446 U.S. 291.

Indeed, less than seven years ago this Court decided, in *Withrow v. Williams*, 507 U.S. 680 (1993), that a *Miranda* violation is cognizable in *habeas corpus* proceedings. In so doing, this Court reaffirmed the constitutional foundation of *Miranda*, and its applicability to the states.

Indeed, one of the primary reasons for the widespread support for *Miranda* among law enforcement is that the constitutional framework concerning confessions has remained remarkably stable since the late 1960s. This is due, in no small part, to the efforts of this Court to resist proposals to revamp or tinker with the constitutional procedures governing interrogations:

> Since the time *Miranda* was decided, the Court has repeatedly refused to bend the literal terms of that decision. To be sure, the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way. . . . *Miranda* is now the law and, in my view, the Court [should] provide[] sufficient justification for departing from it or for blurring its now clear strictures.

New York v. Quarles, 467 U.S. at 660, 662-63 (O'Connor, J., dissenting in part) (collecting cases). In the years since *Miranda*, this Court has consistently rejected modifications that might obscure *Miranda*'s rule. *See, e.g., Moran*, 475 U.S. at 425 (rejecting "the approach urged by respondent . . . [which] would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters"); *Illinois v. Perkins*, 496 U.S. 292, 299 (1990) (noting that "[l]aw enforcement officers will have little difficulty putting into practice our holding").

In the area of law enforcement, consistent application of the law and *stare decisis* are particularly important because the decisions of this Court inevitably affect the day-

to-day conduct of hundreds of thousands of officers. Those officers look to this Court for clear guidance on constitutional matters. A retreat from *Miranda* could disrupt decades of settled police practice and introduce new opportunity for police to make mistakes – mistakes that may render the evidence they gather inadmissible.

Another benefit of the *Miranda* rule is that the values underlying the decision have promoted professionalism among line law enforcement agents throughout this country. Federal law enforcement agencies recognized this even before *Miranda* itself. In explaining why the FBI used *Miranda*-style warnings some fourteen years before the *Miranda* decision, former FBI Director J. Edgar Hoover stated:

> Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual . . . . We can have the Constitution, the best laws in the land, and the most honest reviews by courts -- but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually -- and without end be violated.

J. Edgar Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175, 177-182 (1952) (quoted in *Miranda*, 384 U.S. at 484, n.54).

The FBI warnings – which have been administered for almost *fifty* years – exemplify that respect for human rights and dignity are consistent with the highest aspirations of law enforcement. The effect of *Miranda* on state and local agencies has been equally profound. *See, e.g., Segura*

v. United States, 468 U.S. 796, 838 (1984) (Stevens, J., dissenting) ("For a congery of reasons, among which unquestionably is the added respect for the constitutional rights of the individual engendered by cases like *Miranda* . . . the professionalism that has always characterized the Federal Bureau of Investigation is now typical of police forces throughout the land.").

Finally, law enforcement has a legitimate settled expectation in the message that *Miranda* sends concerning the role of police. *Miranda* is central to the way American law enforcement personnel see themselves and the way that they want to be seen by others. *Miranda* was revolutionary not only because of the content of the warnings, but also because of who was required to give them. It requires police officers to acknowledge explicitly the constitutional limits of their conduct in the suspect's presence. This sends a powerful message from the police to criminal suspects that the police recognize that they are not above the law – and that the writ of this Court runs to every stationhouse.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Daniel C. Richman
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023
(212) 636-6845

Robert S. Litt
(Counsel of Record)
Jonathan R. Streeter
John A. Freedman
ARNOLD & PORTER[21]
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for *Amici Curiae*

January 28, 2000

---

[21] Counsel would like to recognize the considerable assistance of Eric E. Eisenberg, a third-year student at Georgetown University Law Center and Christopher B. Chorengel, a second-year student at the George Washington University Law School.

APPENDIX

AMICI CURIAE

Donald B. Ayer,
Deputy Attorney General, 1989-90; Deputy Solicitor General, 1986-88; United States Attorney, Eastern District of California, 1982-86; Assistant United States Attorney, Northern District of California, 1977-79

Griffin B. Bell,
United States Attorney General, 1977-79; Circuit Judge, United States Court of Appeals for the Fifth Circuit, 1961-76

Joseph E. Brann,
Director, Office of Community Oriented Policing Services (COPS), Department of Justice, 1994-99; Police Chief, Hayward, California, 1990-94; Officer, Santa Ana, California, 1970-90

William Bratton
Police Commissioner, New York Police Department, 1994-96; Police Commissioner, Boston Police Department, 1993-94; Superintendent of Police, Boston, 1992-93; Chief of New York City Transit Police, 1990-92; Superintendent of Metropolitan District Commission Police (Boston), 1986-90; Chief, Massachusetts Bay Transportation Authority Police, 1983-86; Superintendent of Police, Boston, 1980-83; Officer, Boston Police Department, 1970-80

Michael R. Bromwich,
Inspector General, Department of Justice, 1994-99; Assistant United States Attorney, Southern District of New York, 1983-87

Craig Calhoun,
Police Chief, Hayward, California

Zachary W. Carter,
United States Attorney, Eastern District of New York, 1993-99; United States Magistrate Judge, Eastern District of New York, 1991-93; Judge, Criminal Court, Queens County, 1987-91; Executive Assistant District Attorney, Kings County, New York, 1982-87; Assistant United States Attorney, Eastern District of New York, 1975-80.

Thomas V. Cash,
Special Agent-in-Charge of Florida and Caribbean, U.S. Drug Enforcement Agency, 1988-94; Agent, U.S. Drug Enforcement Agency, 1973-88

Dean M. Esserman,
Chief of Police, Stamford, Connecticut; Chief of Police, New York State Metropolitan Transit Authority, Metro North, 1993-98; Assistant Chief of Police, New Haven, Connecticut, 1991-93

Jamie S. Gorelick,
Deputy Attorney General, 1994-97

Jo Ann Harris,
Assistant Attorney General for the Criminal Division, 1993-95; Chief, Fraud Section, United States Department of Justice, 1979-81; Assistant United States Attorney, Southern District of New York, 1974-79, 1981-83

Philip B. Heymann,
Deputy Attorney General, 1993-94; Assistant Attorney General for the Criminal Division, 1978-81

Eleanor Hill,
Inspector General, Department of Defense, 1995-99; Special Attorney, Organized Crime Strike Force, Middle District of Florida, 1978-80; Assistant United States Attorney, Middle District of Florida, 1975-78

Charles J. Hynes,
District Attorney, Kings County, New York

Ralph C. Martin II,
District Attorney, Suffolk County (Boston), Massachusetts

National Black Police Association,
Founded in 1972, the NBPA is a nationwide organization of African-American police associations with approximately 35,000 individual members

The Police Foundation,
Founded in 1970, the Police Foundation is an organization dedicated to improving policing in America through empirical research and technology.

Larry A. Potts,
Deputy Director, Federal Bureau of Investigation, 1995; Assistant Director, F.B.I. Criminal Investigative Division, 1992-95; F.B.I. Agent 1974-91

Stephen A. Saltzburg,
Deputy Assistant Attorney General for the Criminal Division, 1988-89

Jerry Sanders,
Police Chief, San Diego, California, 1993-99; Officer, San Diego Police Department, 1973-93

Paul L. Shechtman,
New York State Criminal Justice Director, 1995-97; Criminal Division Chief, United States Attorney for the Southern District of New York, 1993-95; Counsel to the District Attorney, 1987-93; Assistant United States Attorney, Southern District of New York, 1981-85

Darrel Stephens,
Police Chief, Charlotte-Mecklenburg, North Carolina

Herbert J. Stern,
United States District Judge, District of New Jersey, 1974-87; United States Attorney, District of New Jersey, 1971-74

Larry D. Thompson,
United States Attorney, Middle District of Georgia, 1982-1986

John F. Timoney,
Police Commissioner, Philadelphia, Pennsylvania; Deputy Commissioner, New York Police Department, 1995-96; Chief of Police, New York Police Department, 1994-95; Officer, New York Police Department, 1969-94

John K. Van de Kamp,
Attorney General, State of California, 1983-91; District Attorney, Los Angeles, California, 1975-83; Director, Executive Office of United States Attorneys, 1968-69; United States Attorney, Central District of California, 1966-67; Assistant United States Attorney, Central District of California, 1960-66

Dan K. Webb,
United States Attorney, Northern District of Illinois, 1981-85; Director, Illinois Department of Law Enforcement, 1978-79; Assistant United States Attorney, Northern District of Illinois, 1970-76

William F. Weld,
Governor, Commonwealth of Massachusetts, 1991-97; Assistant Attorney General for the Criminal Division, 1986-88; United States Attorney, District of Massachusetts, 1981-86

Richard Word,
Police Chief, Oakland, California

Jan 28 2000 (13)

No. 99-5525

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

IN THE
Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

JOHN T. PHILIPSBORN
LAW OFFICES OF JOHN T. PHILIPSBORN
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801
Counsel for *Amicus Curiae* California Attorneys for Criminal Justice

PAUL M. SMITH *
DEANNE E. MAYNARD
KIAL S. YOUNG
MATTHEW HERSH
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
P.O. Box 20900
Alexandria, VA 22320
(703) 684-8000
Counsel for *Amicus Curiae* National Association of Criminal Defense Lawyers

* Counsel of Record

January 28, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

38 pp

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT . . 2

ARGUMENT 3

I. SECTION 3501 WAS NOT A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY 3

A. *Miranda* Held That Some Procedural Safeguards Are Constitutionally Required Prior To Custodial Interrogation 3

B. The "Prophylactic" Nature of *Miranda*'s Holding Does Not Undermine its Constitutional Stature 8

C. Subsequent Supreme Court Cases Do Not Undermine *Miranda*'s Constitutional Status 13

D. The Theory of "Constitutional Common Law" Provides No Support for the Legislative Overruling of *Miranda* 15

E. Section 3501 Is an Unconstitutional Attempt to Overrule the Constitutional Holding of *Miranda*, Not a Procedural Safeguard That Is "At Least as Effective" as Those Suggested in *Miranda*. 18

II. THIS COURT SHOULD NOT REVISIT *MIRANDA*'S REQUIREMENT OF PROCEDURAL SAFEGUARDS 20

A. *Miranda* Sets Forth a Workable Requirement 21

B. Reliance Interests Support Adherence to *Miranda*'s Dictates 24

C. Developments in the Law Have Not Rendered *Miranda*'s Requirement Obsolete 25

D. The Factual Premises Underlying *Miranda* Remain Valid and Thus Support Affirming That Decision 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Anders v. California, 386 U.S. 738 (1967) 19

Arizona v. Mauro, 481 U.S. 520 (1987) 6

Arizona v. Roberson, 486 U.S. 675 (1988) 6, 13, 22

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 12

Berkemer v. McCarty, 468 U.S. 420 (1984) 7, 22

Blackledge v. Perry, 417 U.S. 21 (1974) 12

City of Boerne v. Flores, 521 U.S. 507 (1997) 19

Bram v. United States, 168 U.S. 532 (1897) 4

Brandenburg v. Ohio, 395 U.S. 444 (1969) 15

Bruton v. United States, 391 U.S. 123 (1968) 12

California Attorney's for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999), *amended by*, No. 97-56499, __F.3d__, 2000 WL 1639 (9th Cir. Jan. 3, 2000) 1

California v. Peevy, 953 P.2d 1212 (Cal.), *cert. denied*, 119 S. Ct. 595 (1999) 1

California v. Prysock, 453 U.S. 355 (1981) 6

Colorado v. Connelly, 479 U.S. 157 (1986) 6

Colorado v. Spring, 479 U.S. 564 (1987) 6

Connecticut v. Barrett, 479 U.S. 523 (1987) 6

Duckworth v. Eagan, 492 U.S. 195 (1989) 7, 26

Edwards v. Arizona, 451 U.S. 477 (1981) 6, 12
Estelle v. Smith, 451 U.S. 454 (1981) 7
Fare v. Michael C., 442 U.S. 707 (1979) 6
Frazier v. Cupp, 394 U.S. 731 (1969) 8
Freedman v. Maryland, 380 U.S. 51 (1965) 11
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 10
Gideon v. Wainwright, 372 U.S. 335 (1963) 12
Harris v. New York, 401 U.S. 222 (1971) 6, 14
Harris v. Rivera, 454 U.S. 339 (1981) 7
Illinois v. Perkins, 496 U.S. 292 (1990) 6
Johnson v. New Jersey, 384 U.S. 719 (1966) 6
Lovell v. City of Griffin, 303 U.S. 444 (1938) 11
Mapp v. Ohio, 367 U.S. 643 (1961) 26
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 13, 19
Marcus v. Search Warrants, 367 U.S. 717 (1961) 11
McNeil v. Wisconsin, 501 U.S. 171 (1991) 6
Michigan v. Jackson, 475 U.S. 625 (1986) 12
Michigan v. Mosley, 423 U.S. 96 (1975) 6
Michigan v. Tucker, 417 U.S. 433 (1974) ... 7, 13, 14, 24
Michigan v. Tyler, 436 U.S. 499 (1978) 15
Minnesota v. Murphy, 465 U.S. 420 (1984) 6
Minnick v. Mississippi, 498 U.S. 146 (1990) 6
Miranda v. Arizonia, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 7
Mu'Min v. Virginia, 500 U.S. 415 (1991) 7
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 9, 10
New York v. Quarles, 467 U.S. 649 (1984) ..... *passim*
North Carolina v. Butler, 441 U.S. 369 (1979) 6
North Carolina v. Pearce, 395 U.S. 711 (1969) 12
Oregon v. Bradshaw, 462 U.S. 1039 (1983) 6
Oregon v. Elstad, 470 U.S. 298 (1985) ..... *passim*
Oregon v. Haas, 420 U.S. 714 (1975) 6
Oregon v. Mathiason, 429 U.S. 492 (1977) 6
Orozco v. Texas, 394 U.S. 324 (1969) 6
Payne v. Tennessee, 501 U.S. 808 (1991) 20, 21
Pennsylvania v. Muniz, 496 U.S. 582 (1990) 6
Planned Parenthood v. Casey, 505 U.S. 833 (1992) ..... *passim*
Rhode Island v. Innis, 446 U.S. 291 (1980) 6
Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) 11
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 11
Smith v. Illinois, 469 U.S. 91 (1984) 6
Smith v. Phillips, 455 U.S. 209 (1982) 7
Smith v. Robbins, No. 98-1037, 2000 WL 33469 (U.S.

Jan. 19, 2000) 18

Speiser v. Randall, 357 U.S. 513 (1958) 11

Stansbury v. California, 511 U.S. 318 (1994) 6

Stein v. New York, 346 U.S. 156 (1953), *overruled on other grounds, Jackson v. Denno*, 378 U.S. 368 (1964) 12

Thompson v. Keohane, 516 U.S. 99 (1995) 7

United States v. International Business Machine Corp., 517 U.S. 843 (1996) 21

Vasquez v. Hillery, 474 U.S. 254 (1986) 20, 29

Withrow v. Williams, 507 U.S. 680 (1993) ..... *passim*

STATUTES AND CONSTITUTION

18 U.S.C. § 3501 ..... *passim*

28 U.S.C. § 2254(a) 8

U.S. Const. amend. V 3

LEGISLATIVE MATERIAL

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 18

MISCELLANEOUS

The Federalist No. 51 (J. Madison) 17

Yale Kamisar, *Can (Did) Congress 'Overrule' Miranda?*, 85 Cornell L. Rev. (forthcoming April 2000) 19

Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 16, 17

Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117 (1978) 17

Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 501 (1996) 25

Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987) 9, 22

David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev.190 (1988) 9

Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109 (1998) 9, 28

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1/] Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. Because the Fourth Circuit's decision deprives citizens in that Circuit of their Fifth Amendment right against self-incrimination, the NACDL respectfully submits this brief *amicus curiae* in support of reversal.

California Attorneys for Criminal Justice ("CACJ") is the largest organization of criminal defense lawyers in California. Its membership includes both public defenders and privately employed criminal defense lawyers. In the past twenty-five years, CACJ has appeared as *amicus curiae* not only in this Court, but in other courts throughout the United States in cases important to the administration of justice. Recently, CACJ has been involved in litigation related to the issues presented in this case. Through its involvement in *California Atty's for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *amended by,* No. 97-56499, __ F.3d __, 2000 WL 1639 (9th Cir. Jan. 3, 2000), and *California v. Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 119 S. Ct. 595 (1998), the organization has attempted to bring to light certain law

---

1/ Letters of consent have been filed with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or part and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

enforcement practices apparently designed to attempt to circumvent *Miranda v. Arizona*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court is the final arbiter of the meaning of the Constitution. In *Miranda v. Arizona*, the Court determined that custodial interrogation is inherently coercive, that the Fifth Amendment requires procedural protections "to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored," and that in the absence of such protections, no statements obtained can constitutionally be admitted into evidence. 384 U.S. 436, 478-79 (1966). Although the specific language of the "*Miranda* warnings" is not constitutionally required, *Miranda*'s requirement of *some* protection prior to interrogation is a constitutional holding. That *Miranda*'s requirement of procedural safeguards operates as a prophylactic of constitutional rights in no way undermines *Miranda*'s constitutional stature, and is similar to protective measures that the Court has determined are required by the Constitution to secure other constitutional rights. None of the cases relied upon by the Fourth Circuit undermines this conclusion.

Congress cannot override *Miranda*'s interpretation of what the Constitution requires. Section 3501 of Title 18 attempts to do just that. As the Fourth Circuit acknowledged, Section 3501 attempts to reinstate the "totality of the circumstances" case-by-case test that existed prior to *Miranda*, Pet. App. 12a; it does not create procedural safeguards that are equally effective to the warnings suggested in *Miranda*. Because Section 3501 would allow admission of custodial statements obtained in the absence of the procedural protections required by *Miranda*'s interpretation of the Constitution -- as

evidenced by the Fourth Circuit's decision in this case -- the statute is unconstitutional.

The Court should not overturn *Miranda*. Some procedural safeguards at the time of custodial interrogation continue to be essential to protect the Fifth Amendment privilege in the broad run of cases. The warnings suggested by the *Miranda* decision to fulfill that procedural requirement are easy to administer and are ones on which all participants in the criminal justice system have come to rely.

ARGUMENT

I. SECTION 3501 WAS NOT A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY

A. *Miranda* Held That Some Procedural Safeguards Are Constitutionally Required Prior to Custodial Interrogation

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As this Court recently reaffirmed, the privilege against self-incrimination reflects

> many of our fundamental values and most notable aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" . . .

> and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Withrow v. Williams, 507 U.S. 680, 691-92 (1993) (citations omitted). As such, the Fifth Amendment preserves, "by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change." *Bram v. United States*, 168 U.S. 532, 544 (1897).

In *Miranda v. Arizona*, the Court held that the prosecution could not use any statement from custodial interrogation of the defendant unless it could demonstrate "the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. The Court reviewed the historical development of the privilege against self-incrimination and concluded that "the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 460 (citation and quotation omitted). The Court determined that for this guarantee to be realized during the "inherently compelling pressures" of custodial interrogation, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. Although *Miranda* explicitly recognized that the Constitution did not require the specific language of its suggested warnings, the Court nevertheless made clear that the Constitution did require *some* equally effective measures prior to custodial interrogation if the statements were to be used against the accused. *Id.* Accordingly, *Miranda*'s constitutional holding is not the now-familiar warnings themselves, but the

requirement of some such procedural safeguards to protect against the inherently coercive atmosphere of custodial interrogation.

The Fourth Circuit was therefore incorrect to construe the entire *Miranda* decision as merely a rule of "evidence and procedure" that could be overruled by an Act of Congress. Pet. App. 13a-14a. For one, contrary to the Fourth Circuit's assertion, *id.* at 14a, the *Miranda* Court did not fail to state a constitutional basis for its requirement of some procedural safeguards. Rather, the Court stated explicitly -- in the very first paragraph of its opinion -- that its decision was rooted in the "Fifth Amendment to the Constitution." 384 U.S. at 439. Indeed, the Court took pains throughout its opinion to underscore the constitutional values at stake, noting its "concern for adequate safeguards to protect precious Fifth Amendment rights," *id.* at 457, describing "the Fifth Amendment standard for compulsion which we implement today," *id.* at 461, and observing that its safeguards were necessary "to insure that what was proclaimed in the Constitution had not become but a form of words." *Id.* at 444 (citation and quotation omitted).

Nor is the constitutional nature of *Miranda*'s requirement that there be some procedural safeguards undercut by its suggestion that States develop their own safeguards to protect the privilege against self-incrimination, as the Fourth Circuit erroneously asserted. Pet. App. 14a. As explained above, although the Court did recognize that the Constitution does not require "adherence to any particular solution," 384 U.S. at 467, the Court was quick to point out that its safeguards were to be observed "unless we are shown other procedures which are *at least as effective* in apprising accused persons of their right of silence and in assuring a continuous opportunity

to exercise it." *Id.* (emphasis added). To the *Miranda* Court, there was little doubt that the judiciary, rather than the legislature, would have the final word as to whether any particular safeguards were constitutionally sufficient: "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Id.* at 491.

That *Miranda* read the Constitution to require procedural safeguards is further demonstrated by this Court's imposition of *Miranda* upon the States. Indeed, three of the four cases decided in the *Miranda* opinion itself arose out of State-court decisions. *See id.* at 491-99. Since then, the Court has ordered the exclusion of evidence on *Miranda* grounds in at least seven State cases,[2/] while applying *Miranda* (though eventually permitting the use of challenged evidence) in nearly two dozen others.[3/] The Fourth Circuit did not attempt to

---

2/ *See, e.g., Stansbury v. California*, 511 U.S. 318 (1994); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Smith v. Illinois*, 469 U.S. 91 (1984); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Orozco v. Texas*, 394 U.S. 324 (1969).

3/ *See, e.g., McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Illinois v. Perkins*, 496 U.S. 292 (1990); *Arizona v. Mauro*, 481 U.S. 520 (1987); *Colorado v. Spring*, 479 U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *California v. Prysock*, 453 U.S. 355 (1981); *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Fare v. Michael C.*, 442 U.S. 707 (1979); *North Carolina v. Butler*, 441 U.S. 369 (1979); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Oregon v. Haas*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *Johnson v. New Jersey*, 384 U.S. 719 (1966). Though the Court held in each of these cases that *Miranda* did not bar the use of the challenged evidence, at no time did the Court suggest that it lacked the power to apply *Miranda* to a State-court decision.

explain how *Miranda* could have been applied so routinely to the States if the requirement of procedural safeguards were not constitutionally compelled, acknowledging only that it raised "an interesting academic question." Pet. App. 24a n.21. But far from being an "academic question," the matter is rather one of long-settled constitutional law. As this Court has made clear on many occasions, "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of *constitutional dimension*." *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (emphasis added).[4/] The meaning of these words could not be more plain: *Miranda*'s requirement of safeguards must be rooted in the Constitution, or the States would be free to ignore it.

Finally, the constitutional nature of *Miranda*'s requirement of procedural safeguards is further evidenced by the Court's consideration of *Miranda* claims on federal habeas review. The Court has entertained a number of habeas claims on the basis of *Miranda*, the latest as recently as 1995.[5/]

4/ *See also Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) ("Federal judges have no general supervisory power over state trial judges; they may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Federal Constitution."); *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (for cases tried in State courts, "our authority is limited to enforcing the commands of the United States Constitution").

5/ *Thompson v. Keohane*, 516 U.S. 99 (1995). *See also Withrow v. Williams*, 507 U.S. 680 (1993); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Moran v. Burbine*, 475 U.S. 412 (1986); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Estelle v. Smith*, 451 U.S. 454 (1981); *Michigan v. Tucker*, 417

Though the application of *Miranda* to habeas claims has occasionally brooked dissent, *see, e.g.*, *Withrow*, 507 U.S. at 650-57 (O'Connor, J., concurring in part and dissenting in part), no Justice of this Court has ever suggested that habeas petitioners who were denied adequate safeguards during the course of their custodial interrogations are not "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The reason for this is once again clear: *Miranda*'s requirement of some procedural safeguards is one of constitutional origin.

B. The "Prophylactic" Nature of *Miranda*'s Holding Does Not Undermine its Constitutional Stature

The Fourth Circuit mistakenly relied on this Court's occasional suggestion that the *Miranda* requirement of procedural safeguards is not a constitutional "right," but instead functions as a "prophylactic" protecting underlying Fifth Amendment rights. Pet. App. 14a. The Court has indeed recognized that excluding confessions obtained in the absence of the required procedural protections can, on occasion, overprotect the right against compelled self-incrimination. *See Oregon v. Elstad*, 470 U.S. 298, 307 (1985). But the Court also has recognized that, absent some such procedural safeguards, it is inevitable that the Fifth Amendment rights of many persons will be violated. Contrary to the conclusion of the Fourth Circuit, *Miranda* is no less a *constitutional* requirement

---

U.S. 433 (1974); *Frazier v. Cupp*, 394 U.S. 731 (1969).

merely because it is designed to protect constitutional rights in the broad run of cases.[6/]

Although *Miranda* itself described its requirement as "procedural safeguards," 384 U.S. at 444, the *Miranda* Court clearly believed its "prophylaxes" were required by the Constitution. Given the inherently coercive nature of custodial interrogation, *Miranda* erected under the Fifth Amendment an irrebuttable "presumption of compulsion" in the absence of *ex ante* procedures to protect the privilege against self-incrimination. *Elstad*, 470 U.S. at 307. It did so -- despite the fact that some custodial confessions of some individuals may not in fact be "coerced," even without warnings or other comparable procedural safeguards -- based on a judgment about the institutional competence of the courts to assess compulsion on a *post hoc* basis. The Court recognized that, in the absence of procedures to ensure notice of the applicable rights, the courts would frequently fail to identify those cases where subtle coercion was exploited by the police.

The requirement of prophylactic safeguards in *Miranda* is consistent with many other constitutional decisions in which the Court, based on its assessment of practical realities, has demanded broad-based standards or procedures to ensure the vindication of constitutional rights. For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court interpreted the First Amendment to require, as a "safeguard[]" to ensure the protection of the constitutional right to freedom of speech, that a public official prove "actual malice" to recover

---

6/ *See, e.g.*, Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 153-62 (1998); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988).

damages for a defamatory falsehood. *See id.* at 264-65, 279. In so holding, the Court rejected a rule that would have allowed damages unless the speaker could prove the truth of his factual assertions, *i.e.*, that his speech was actually protected by the First Amendment. *See id.*; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"). The Court did so based on its empirical judgment that, "[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279.

Analogous to its holding in *Miranda*, the Court concluded that the "breathing space" afforded by its "actual malice" test, *see id.* at 271-72 -- which necessarily overprotects First Amendment rights *in fact* -- was *necessary* "to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Id.* at 264-65. This prophylactic rule is based in part on the practical limitations of attempting to judge each case individually to determine whether the libel action would infringe on First Amendment rights. *See Gertz*, 418 U.S. at 343-44 ("Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application."). The prophylactic nature of the *New York Times v. Sullivan* holding, however, does not alter its constitutional status, because the Court has recognized that, without this protection, constitutional rights will frequently be trampled.

Similarly, in a line of cases beginning with *Lovell v. City of Griffin*, 303 U.S. 444 (1938), the Court has held that, in the absence of "narrow, objective, and definite standards to guide . . . licensing authorit[ies]," the regulation of speech violates the First Amendment, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), even if *in fact* that speech might have been properly subject to regulation. *See id.* at 151 ("[A] person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."). This rule is based in part on the Court's empirical assessment that, in practice, licensing officials who exercise standardless discretion are likely to infringe on constitutionally protected speech. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (noting that a standardless statute is "[i]nstinct with . . . ever-present potential for arbitrarily suppressing First Amendment liberties"). *See also Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("[O]ne has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license"); *Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) ("Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled"); *Speiser v. Randall*, 357 U.S. 513, 524 (1958) ("[C]riminal advocacy can be suppressed or deterred, but it is clear that the State which attempts to do so must provide procedures amply adequate to safeguard against invasion of speech which the Constitution protects") (citations omitted).

As *Miranda* illustrates, the Court has seen a need for similar prophylactic rules in the area of constitutional criminal

procedure. Subsequent to *Miranda*, for example, the Court imposed an additional protective layer to the privilege against self-incrimination in the case of *Edwards v. Arizona*, 451 U.S. 477 (1981), holding that a suspect who has asked for counsel will not be deemed to have relinquished that right unless the suspect "initiates further communication, exchanges or conversation" with authorities. *Id.* at 485. A similar protective measure governs the Sixth Amendment right to counsel, which may not be deemed waived unless the suspect has initiated a conversation with the police. *Michigan v. Jackson*, 475 U.S. 625 (1986).[7/] Other examples include the conclusive presumption that an indigent has a need for appointed counsel, regardless of his maturity, background, or education, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the presumption that a judge who imposes a harsher sentence on retrial after reversal of an earlier conviction has been motivated by vindictiveness, *North Carolina v. Pearce*, 395 U.S. 711 (1969), and a like presumption regarding prosecutors who charge a more serious offense at a defendant's rightful retrial. *Blackledge v. Perry*, 417 U.S. 21 (1974).[8/]

7/ The Sixth Amendment is also the source of the presumption, derived from the Confrontation Clause, that no limiting instruction can cure the introduction into evidence of a nontestifying codefendant's confession in a joint trial. *Bruton v. United States*, 391 U.S. 123 (1968).

8/ Interestingly, the Court also adhered to a number of prophylactic rules in evaluating claims of coerced confessions under the Fourteenth Amendment's "involuntariness" standard, which prior to *Miranda* was the primary source of regulation of State custodial interrogations. *See, e.g., Ashcraft v. Tennessee*, 322 U.S. 143, 154 n.9 (1944) (holding that the questioning of a suspect for 36 hours straight "preclude[s] a holding that he acted voluntarily" in confessing, irrespective of any other factor); *Stein v. New York*, 346 U.S. 156, 182 (1953) ("Physical violence or threat of it by the custodian of a prisoner during detention . . . invalidates confessions that would otherwise be convincing. . . . When present, there is no need to weigh or measure its effects on the will of the individual victim."), *overruled on other grounds, Jackson v. Denno*, 378 U.S. 368 (1964).

The empirical assessments made in *Miranda* are no different, and that decision's prophylactic safeguards are no less constitutionally required. Whatever the procedures are called, "[a] major purpose of the Court's opinion in *Miranda v. Arizona* . . . was 'to give concrete *constitutional* guidelines for law enforcement agencies and courts to follow.'" *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (emphasis added). As the *Miranda* Court explained, without such specific safeguards implementing the Constitution, "[i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas." 384 U.S. at 443 (citation and quotation omitted). As such, the holding in *Miranda* is precisely the type of constitutional interpretation envisioned in *Marbury v. Madison*. *See* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

C. Subsequent Supreme Court Cases Do Not Undermine *Miranda*'s Constitutional Status

The Fourth Circuit relied upon several Supreme Court cases subsequent to *Miranda* for its conclusion that "it is certainly well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation." Pet. App. 14a-16a (discussing *Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Tucker*, 417 U.S. 433 (1974); *New York v. Quarles*, 467 U.S. 653 (1984); and *Oregon v. Elstad*, 470 U.S. 298 (1985)) (citation omitted). But the cases cited in no way suggest that *Miranda* can be legislatively overruled.

None of the holdings in these cases poses any threat at all to the central holding of *Miranda*, which is that statements taken without procedural protections may not be used in the State's case in chief. In *Harris*, the Court allowed such statements to be used for impeachment purposes, 401 U.S. at 225-26, but the Court was careful to reaffirm explicitly the *Miranda* Court's holding that these statements could never be used in the case in chief. *Id.* at 224. In *Tucker* and *Elstad* the Court held that evidence constituting the "fruit" of a confession taken from a suspect during an interrogation lacking adequate safeguards could properly be admitted against the suspect in question;[9/] in both cases, again, the Court was careful to make clear that the confession *itself* was not permitted in the prosecution's case in chief. *Tucker*, 417 U.S. at 445; *Elstad*, 470 U.S. at 306 n.1, 317. And in *Quarles*, the Court held that procedural safeguards were not necessary where the custodial questioning of a suspect was compelled by "overriding considerations of public safety," 467 U.S. at 651; the Court made clear that its exception was intended to be a narrow one. *Id.* at 659 n.8.

Nor do any of these cases, when read in their proper light, cast doubt on the factual predicate of *Miranda* -- the recognition that custodial interrogations are inherently coercive. *See* 384 U.S. at 458. Instead, the Court appears to have relied on a practical assessment that the use of confessions

---

9/ In *Tucker* the Court held that where a suspect's confession in violation of *Miranda* led police to a witness, it was permissible for the State to introduce the testimony of that witness. *Tucker*, 417 U.S. at 450. In *Elstad* the Court held that where a suspect confessed prior to being given *Miranda* warnings, the police could properly warn the suspect under *Miranda* and then obtain a usable confession, even if the second confession was in effect a "fruit" of the first. *Elstad*, 470 U.S. at 318.

to impeach or for their evidentiary "fruits" is sufficiently removed from the core concerns of the Fifth Amendment that *Miranda* need not be extended that far. In essence, the Court has recognized that the constitutional requirements governing custodial confessions cannot be applied without reference to the uses to which the government intends to put the confessions. *See Quarles*, 467 U.S. at 668-69 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The *Miranda* decision quite practically does not express any societal interest in having those warnings administered for their own sake. Rather, the warnings and waiver are only required to ensure that 'testimony' used against the accused at trial is voluntarily given."). It is one thing to erect a prophylactic rule barring use of a potentially coerced confession as direct evidence against the speaker. That is a quintessential form of self-incrimination. But the constitutional calculus is quite different when the use of the confession is much more indirect.[10/]

D. The Theory of "Constitutional Common Law" Provides No Support for the Legislative Overruling of *Miranda*

The Court should decline the invitation posed by *amicus curiae* Washington Legal Foundation to hold that *Miranda* is a form of "constitutional common law" that can be

---

10/ As noted, the Fourth Circuit also commented that the Court cast doubt on *Miranda*'s constitutional basis when it recognized a "public safety" exception in *Quarles*. But public safety exceptions are a regular appendage to many well-established constitutional rights. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (finding an exigent-circumstances exception to the warrant requirement of the Fourth Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (setting out the terms by which a State may abridge the right of free speech in order to avoid "imminent lawless action").

legislatively overruled. *Brief Amicus Curiae of Washington Legal Foundation in Partial Support of Petitioner*, at 9 (filed Nov. 1, 1999) (citation omitted) ("WLF Brief"). Drawing largely on a twenty-five-year-old law review article,[11/] proponents of this theory assert that so-called "constitutional common law," as a form of judge-made law designed to advance constitutional values, shares the same ranking as federal statutes in our constitutional framework -- capable of being imposed upon the States, but subject to revision at any time by Congress. To its proponents, this argument explains at one stroke why *Miranda* has been applied to the States and why Congress, in the form of Section 3501, was empowered to overrule it.

But this argument either proves too little or proves too much. To the extent that it merely recognizes the power of this Court to elaborate prophylactic rules needed to enforce the Constitution, *amici* agree that such a power exists, and have already set forth the reasons why Congress (although perhaps empowered to suggest alternative prophylactic rules) cannot simply repeal them. But to the extent the argument is that federal courts can make up common law, subject to legislative repeal, in any area generally touched by the Constitution, it is simply wrong.

Not even the article relied upon by *amicus* goes that far. It recognized that, even if the specific language of the warnings suggested by the *Miranda* Court are themselves accurately described as "constitutional common law," "*Miranda* . . . holds that 'adequate' safeguards are constitutionally required, and

---

11/ Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975).

this puts a check on what Congress may do." Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 42 n.217 (1975). Thus understood, the "constitutional common law" theory is of no more service to *amicus curiae* than the *Miranda* opinion itself -- which permits legislative experimentation so long as suitable protections remain.

Moreover, acceptance of *amicus curiae*'s vision of "constitutional common law" would represent a dangerous departure from long-accepted constitutional principles. It would upset the federal-state balance by providing the Court with an almost unrestrained power to meddle in affairs previously thought to be within the purview of the States. It would upset the separation-of-powers doctrine by blurring the lines between judicial and legislative authority, defying the Framers' vision of distinct spheres of authority. *See The Federalist No. 51* (J. Madison). And by granting the legislature a license to overrule decisions of this Court, it would risk undermining the respect for judicial authority and finality that *Marbury v. Madison* instilled in the Republic nearly two centuries ago. The Court should reject this impoverished vision of its constitutional role, and read *Miranda* for what it is: a decision resting on, interpreting, and construing the Constitution. Neither common sense nor constitutional history admits of any principled alternative.[12/]

12/ *See* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117 (1978).

E. Section 3501 Is an Unconstitutional Attempt to Overrule the Constitutional Holding of *Miranda*, Not a Procedural Safeguard That Is "At Least as Effective" as Those Suggested in *Miranda*

Contrary to the suggestion of *amicus curiae*, WLF Brief at 13, Section 3501 cannot be the sort of "alternative[] for protecting the privilege" that the *Miranda* decision sanctioned. As *Miranda* makes clear, for such an alternative to be constitutionally sufficient, it must operate *prior* to the custodial interrogation and must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" as the warnings suggested in that case. *Miranda*, 384 U.S. at 467.[13/] Section 3501, however, does not (and does not even purport to) create *any* procedural safeguard at the time of the custodial interrogation. To the contrary, as the Fourth Circuit recognized, Section 3501 attempts to restore the "case-by-case determination" standard used prior to *Miranda*. Pet. App. 12a; *see* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134-35, 2137-38.[14/]

13/ *See id.* at 444 ("other fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *id.* at 443 ("a full and effective warning of his rights at the outset of the interrogation process"); *id.* at 457 ("appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice"); *id.* at 467 ("the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored").

14/ This case is thus not like *Smith v. Robbins*, No. 98-1037, 2000 WL 33469 (U.S. Jan. 19, 2000), decided earlier this Term. There, California had adopted an alternative procedural safeguard to the one suggested by the Court in *Anders v. California*, 386 U.S. 738 (1967); here, Section 3501 creates *no* procedural safeguard.

Under the terms of Section 3501, the admissibility of all confessions, including ones made during custodial interrogation, would be based on a judicial *post hoc* review of the "totality of the circumstances." The majority in *Miranda*, however, rejected this standard as constitutionally insufficient to determine the admissibility of statements made while in custody. *See* 384 U.S. at 468-69 (noting that a *post hoc* consideration of the sort conducted under the "totality of the circumstances" inquiry "can never be more than speculation" and concluding that, in any event, "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time"). Because, as established above, the requirement of some procedural protection at the time of interrogation represents the Supreme Court's interpretation of what the Constitution requires, the statute is beyond the power of Congress, *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), and is thereby void. *See Marbury*, 5 U.S. (1 Cranch) at 180 ("a law repugnant to the constitution is void").[15/]

15/ Indeed, many of the principal sponsors of Section 3501 appeared to view their legislation as an effort to persuade the Court to revisit *Miranda* rather than an attempt to overrule it directly. *See* Yale Kamisar, *Can (Did) Congress 'Overrule' Miranda?*, 85 Cornell L. Rev. (forthcoming April 2000) (manuscript at 19-20, lodged with the Court).

II. THIS COURT SHOULD NOT REVISIT *MIRANDA*'S REQUIREMENT OF PROCEDURAL SAFEGUARDS

Miranda's requirement of procedural safeguards, in conjunction with its suggested warnings, has provided, and continues to provide, an eminently workable rule under which suspects and law enforcement alike are informed, respectively, of their fundamental rights and what conduct is required of them. Experience has not borne out the need for reexamination of the premises underlying *Miranda*'s exclusionary rule -- indeed, the coercive nature of custodial interrogation that prompted the Court to enunciate that rule simply has not diminished over time. Moreover, provision of some procedural safeguards prior to custodial interrogation has come to be viewed as an essential component of fair prosecutorial procedure. Any retreat from those safeguards would undermine public confidence in our criminal justice system and in this Court's commitment to vindicating the fundamental rights of citizens.

The principles of *stare decisis* weigh decidedly in favor of reaffirming *Miranda*. *Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Adherence to this doctrine is duly recognized as the preferred course, because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis* is not an "inexorable command," *id.* at 828, and admittedly is less rigidly applied in

constitutional cases such as this one, *see id.*; *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). Nonetheless, *stare decisis* is firmly rooted in the rule of law, and "even in constitutional cases, the doctrine carries such persuasive force that [this Court] has always required a departure from precedent to be supported by 'special justification.'" *United States v. International Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne*, 501 U.S. at 842 (Souter, J. concurring)).

Among the factors the Court considers in determining whether to revisit precedent are "whether the rule has proven intolerable simply in defying practical workability," "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and "whether the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854-55. None of these factors supports -- let alone compels -- reexamination of *Miranda* today.

A. *Miranda* Sets Forth a Workable Requirement

There can be no serious dispute that *Miranda* sets forth a workable requirement, particularly given its suggestion of specific warnings that are sufficient to meet that requirement. *See Miranda*, 384 U.S. at 444-45. Those warnings -- or some equally effective substitute -- must be provided prior to custodial interrogation; if they are not, any statements obtained will be excluded from proof for the government's case at

trial.[16/] The warnings are easy for law enforcement to administer. *See Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (extolling merit of ease and clarity of *Miranda*'s application); *Roberson*, 486 U.S. at 680 (same). Indeed, the government itself has acknowledged that "[f]ederal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions." Pet. Resp. 21. Further telling evidence of *Miranda*'s workability is that the Federal Bureau of Investigation made use of substantially similar warnings even before *Miranda* required some such procedural safeguards. *See id.*; *Miranda*, 384 U.S. at 483-84 & n.54.

This Court has repeatedly agreed. Most recently, in *Withrow*, 507 U.S. at 695, the Court observed: "We must remember . . . that *Miranda* came down some 27 years ago . . . and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *See also Quarles*, 467 U.S. at 663 (since *Miranda*, "law enforcement practices have adjusted to its strictures") (O'Connor, J., concurring in the judgment in part and dissenting in part) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in the judgment)). Empirical research has confirmed the ease with which law enforcement has implemented *Miranda*'s simple mandate. *See, e.g.*, Schulhofer, *Reconsidering Miranda*, at 455-57 & n.56 (noting "many studies have shown that the degree of compliance with *Miranda*'s requirements . . . has been high").

16/ The public safety exception recognized in *Quarles* is the only exception to this rule, allowing the substantive use of unwarned statements obtained under circumstances implicating public safety. *See Quarles*, 467 U.S. at 655.

That the exact form of the procedural safeguards is open to refinement further evidences *Miranda*'s workability. Recognizing that the Constitution does not require the precise warnings articulated in the *Miranda* decision, the Court made clear that Congress and the States are free to establish alternative procedures for protecting the privilege against self-incrimination, so long as any alternative they adopt is "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467. *Miranda* itself thus allows for adjustments to be made -- within constitutional limits -- to improve the workability of its requirement, should such adjustments become necessary.

Any potential "costs" resulting from *Miranda*'s exclusion of custodial confessions obtained in the absence of the required safeguards are entirely beside the point in evaluating the workability of *Miranda*'s requirement. As the *Miranda* Court made abundantly clear, society's interest in interrogating a suspect is subordinate to the commands of the Constitution. *See Miranda*, 384 U.S. at 479; *Quarles*, 467 U.S. at 662 (O'Connor, J. concurring in the judgment in part and dissenting in part). Even so, it is manifestly apparent that the benefits of *Miranda*'s protections outweigh any attendant costs. Barring the use of a statement taken in the absence of safeguards imposes at most a slight cost; the government is merely forced to prove its case against the defendant using other evidence -- it does not face necessary defeat. As such, *Miranda* has not caused "undue interference" with our system of law enforcement, 384 U.S. at 481, and it has certainly not "proven intolerable." *Casey*, 505 U.S. at 855.

By contrast, the use of an unlawfully obtained confession poses a danger of constitutional magnitude for the

accused. In addition to violating his Fifth Amendment right against self-incrimination, such use may effectively deprive the accused of his Sixth Amendment right to trial by relieving the government entirely of its burden of proof; faced with his own confession, the suspect could well lose his defense before he has an opportunity to present it. *Cf. Tucker*, 417 U.S. at 440-41 ("[A]n inability to protect the [Fifth Amendment] right [to silence] at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury."). Such a result is antithetical to "our accusatory system of criminal justice [which] demands that the government seeking to punish an individual produce the evidence against him *by its own independent labors*, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda*, 384 U.S. at 460 (emphasis added). Plainly, if there is any risk to be allocated here, the Constitution requires that it be borne by the government, not by the accused.

B. Reliance Interests Support Adherence to *Miranda*'s Dictates

Generally speaking, the reliance factor is most pertinent in commercial cases, but it nonetheless has some resonance here. *See Casey*, 505 U.S. at 856 (recognizing societal reliance on tenets of *Roe v. Wade*, 410 U.S. 113 (1973)). Since *Miranda*, society has come to expect the procedural safeguards of *Miranda* as an indication of the government's commitment to making the custodial interrogation process fair and to protecting the constitutional rights of suspects. As one scholar has noted, "compliance with the *Miranda* safeguards is widely considered an elementary prerequisite of fair procedure and the

decent restraint of police power." Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 501 (1996); *see also id.* at 562 (noting that "criminal procedure safeguards . . . help shape the self-conception and define the role of conscientious police professionals; they underscore our constitutional commitment to restraint in an area in which emotions easily run uncontrolled"). Repudiation of the procedural safeguards required by *Miranda* thus would undermine society's confidence in the prosecutorial process, and in law enforcement's commitment to uphold the fundamental rights of the citizens they are charged with protecting. Moreover, evisceration of *Miranda*'s dictates likely would encourage law enforcement to test the limits of lawful interrogation practices, a result this Court should not invite.

C. Developments in the Law Have Not Rendered *Miranda*'s Requirement Obsolete

This Court has never suggested that *Miranda*'s core holding should be overruled. There has been some suggestion among commentators, however, that post-*Miranda* developments in the law have diminished the need for *Miranda*'s exclusionary rule. Specifically, the theory has been advanced that various civil, criminal, and administrative remedies now available against law enforcement officers who engage in coercive interrogation tactics provide both a remedy for that unlawful conduct and a deterrent to future coercive behavior. *See, e.g.*, WLF Brief at 13-15. In light of these remedies, the theory goes, "the legal incentives for non-coercive police questioning [are] almost unrecognizably greater than when *Miranda* was decided," and *Miranda*'s exclusionary rule is thus unnecessary. *Id.* at 13.

The theory is wrong. The basic intuition underlying *Miranda* is a recognition that it is very difficult to show coercion of a confession after the fact. Nothing has changed that reality. The expansion of *post hoc* remedies, although commendable, can have at most a marginal effect. It is simply fantasy to suppose that more than a small fraction of victims of coercion in a post-*Miranda* world would initiate (and succeed with) civil, criminal, or administrative proceedings. It follows that the availability of sanctions against offending officers does not weaken *Miranda*'s requirement in the least, let alone render it obsolete or a mere "remnant of abandoned doctrine." *Casey*, 505 U.S. at 855; *see also Mapp v. Ohio*, 367 U.S. 643, 651-53 (1961) (holding that only the exclusion of improperly seized evidence would be a sufficient remedy to deter violations of the Fourth Amendment).

Moreover, any reliance on *post hoc* remedies overlooks the fact that *Miranda* imposes constitutional constraints on two distinct phases of criminal proceedings: when statements are taken in the course of custodial interrogation as well as when those statements are later used at trial. *Post hoc* remedies are aimed at the former but do nothing to address the latter. It follows that even if *post hoc* remedies were capable of deterring some coercive interrogations, these remedies would not adequately "guard against 'the use of unreliable statements at trial.'" *Withrow*, 507 U.S. at 692 (citation omitted); *see also id.* at 690 ("'Prophylactic' though it may be, in safeguarding a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'") (citation omitted). As the suppression remedy is "quite possibly contained within the guarantee of the Fifth Amendment itself," *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring), it is obvious that *post hoc* remedies, however effective they may be, cannot possibly serve

as an adequate substitute for the exclusion of statements taken in violation of *Miranda*.

D. The Factual Premises Underlying *Miranda* Remain Valid and Thus Support Affirming That Decision

Miranda was based primarily on the Court's conclusion that custodial interrogation is inherently coercive. In each of the cases before it, the defendant was subjected to incommunicado interrogation in a police-dominated atmosphere. Taking special notice of the fact that "in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements [made] were truly the product of free choice," the Court found it "obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457. The Court, therefore, concluded that the "practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself," and that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Miranda*, 384 U.S. at 457-58.[17/]

17/ In reaching this conclusion, the Court noted particularly that police manuals of the time affirmatively promoted the use and efficacy of this approach. *See Miranda*, 384 U.S. at 449 ("[t]he officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation'").

The factual circumstances underlying *Miranda*'s holding have not changed. Suspects still are questioned in isolation under conditions containing "inherently compelling pressures." *Id.* at 467. Notably, we have not progressed to a point where counsel is provided to a suspect at the interrogation stage, or a magistrate is present to monitor and preserve the integrity of the interrogation process. *Cf. id.* at 466 (presence of counsel would constitute adequate protective device to make process of police interrogation conform to dictates of privilege against self-incrimination). Moreover, substantial empirical evidence exists that coercive interrogation tactics continue to be employed by law enforcement personnel throughout the country. *See, e.g.*, Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 153-62 (1998) (reviewing various interrogation techniques and their effects on suspects). Indeed, scholarship suggests that in recent years, police questioning techniques -- including the deliberate interrogation of suspects in contravention of the *Miranda* requirements in order to obtain material usable as impeachment or for its evidentiary "fruits" -- have become even more psychologically compelling than those considered by the *Miranda* Court itself. *See, e.g., id.* at 158-62. Nor has the Court itself questioned the factual premise of its holding in *Miranda* since that case was decided. These circumstances demonstrate the continuing need to provide suspects with some procedural safeguards prior to custodial interrogation. Accordingly, it cannot be said that "the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *See Casey*, 505 U.S. at 855.[18/]

18/ Nor does the fact that the *Miranda* warnings have become embedded in our culture reduce the need to inform each and every suspect of his right to silence prior to custodial questioning. If citizens today are more familiar with their right to silence than they were in the past, that is merely testament to the *Miranda* rule's value and efficacy; it is not proof that the rule is outdated or no longer necessary. As long as custodial interrogation continues to be conducted behind closed doors, the suspect alone with his questioner(s), there will be a need to apprise him, or remind him, *at that time* of his rights.

This Court has strayed from the "straight path of *stare decisis* . . . only when [it] has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez*, 474 U.S. at 266 (quotation omitted). Neither experience nor factual developments since *Miranda* justify a departure from the fundamental dictates of that decision. Moreover, the Court today does not consider the propriety of *Miranda*'s procedural safeguard requirement on a clean slate. For more than thirty years, this requirement has protected the right against self-incrimination for hundreds of thousands of persons confronted with the inherently compelling pressures of custodial interrogation. The requirement has further served as demonstrable evidence of this Court's commitment to vindicating the constitutional rights of citizens. It should not be abandoned now.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

JOHN T. PHILIPSBORN
LAW OFFICES OF
JOHN T. PHILIPSBORN
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801

Counsel for *Amicus Curiae*
California Attorneys for
Criminal Justice

PAUL M. SMITH*
DEANNE E. MAYNARD
KIAL S. YOUNG
MATTHEW HERSH
JENNER & BLOCK
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
(703) 684-8000

Counsel for *Amicus Curiae*
National Association of
Criminal Defense Lawyers

* *Counsel of Record*

January 28, 2000

Jan 28 2000

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF BENJAMIN R. CIVILETTI *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA

Benjamin R. Civiletti
Kenneth C. Bass, III
(Counsel of Record)
John F. Cooney
Venable, Baetjer, Howard &
Civiletti LLP
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Counsel for Amicus Curiae

January 28, 2000

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE *MIRANDA* RULES AID THE ENFORCEMENT OF FEDERAL CRIMINAL LAWS BY FACILITATING DECISIONS BY PROSECUTORS CONCERNING WHICH CRIMINAL CASES SHOULD BE PURSUED 5

II. THE COURT OF APPEALS VIOLATED THE PRINCIPLE OF SEPARATION OF POWERS AND USURPED EXECUTIVE AUTHORITY, BY BASING ITS DECISION ON A GROUND THAT THE EXECUTIVE BRANCH EXPLICITLY DECLINED TO INVOKE 7

A. Governing Legal Authority 8

B. The Decision by the Court of Appeals, to Overturn the Suppression of the Defendant's Statement on a Ground that the Executive Branch Expressly Chose Not to Present, Violated the Principle of Powers 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES:

Baker v. Carr, 369 U.S. 186 (1962) 11

Davis v. United States, 512 U.S. 452 (1994) 7, 14

Ex parte United States, 287 U.S. 241 (1932) 9

Heckler v. Chaney, 470 U.S. 821 (1985) 8

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Morrison v. Olson, 487 U.S. 654 (1988) 13, 14

Muskrat v. United States, 219 U.S. 346 (1911) 11

Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984) 11

Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) 9

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 11

The Grey Jacket, 72 U.S. (5 Wall.) 370 (1866) 9

United States v. Armstrong, 517 U.S. 456 (1996) 8, 9

United States v. Cox, 342 F.2d 167 (5th Cir.)(en banc), *cert. denied*, 381 U.S. 935 (1965) 9, 10

United States v. Nixon, 418 U.S. 683 (1974) 8

United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) 9

United States v. Thompson, 251 U.S. 407 (1920) 9

Table of Authorities continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Constitution

Article II, § 1 8
Article II, § 3 8

Statutes

2 U.S.C. § 288k(b) 7
28 U.S.C. § 516 9
28 U.S.C. § 547 9
28 U.S.C. § 3501 ..... *passim*

MISCELLANEOUS:

2 Op. Att'y Gen. 482 (1831) 9

IN THE

Supreme Court of the United States

No. 99-5525

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF BENJAMIN R. CIVILETTI *AMICUS CURIAE*
IN SUPPORT OF THE UNITED STATES OF AMERICA

INTEREST OF *AMICUS CURIAE*

Benjamin R. Civiletti, having obtained the written consents of the parties pursuant to Rule 37.3, submits this Brief *amicus curiae*.[1] Mr. Civiletti is a distinguished lawyer with a long career that spans public service and private practice. His background and experience in criminal law provide a basis for

---

[1] This brief was not authored, in whole or in part, by counsel to a party, and no monetary or other contribution to the preparation or submission of this brief was made by any person or entity other than the amicus and his counsel. The consents of the parties have been filed with the Court.

his analysis, from the point of view of Federal prosecutors, of the effects of the *Miranda* warnings on the operation of the criminal justice system and of the adverse effects of the lower court's decision on the ability of the Department of Justice to carry out its role, as the President's delegate, in helping him discharge his constitutional responsibility to "take care that the laws be faithfully executed."

From 1962 until 1964, Mr. Civiletti served as an Assistant United States Attorney. In 1977, he joined the Department of Justice as the Assistant Attorney General in charge of the Criminal Division. In 1978, he was appointed Deputy Attorney General. In 1979, he was appointed Attorney General and served in that capacity until the end of the Carter Administration in 1981. During his tenure at the Department, Mr. Civiletti was responsible for the development and publication of the Department's Principles of Federal Prosecution. Mr. Civiletti is presently engaged in private practice in Washington, D.C. at the firm of Venable, Baetjer, Howard & Civiletti, where he serves as Chairman of the firm's Board. The views expressed in this Brief are those of Mr. Civiletti and his counsel in their personal capacities and do not necessarily reflect the views of the firm.

SUMMARY OF ARGUMENT

The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), is a victim of its own success. In the 34 years since the case was decided, prosecutors at all levels, as well as State and Federal courts, have largely been spared the extensive litigation over the voluntariness of confessions that marked administration of the prior totality-of-the-circumstances test. *Id.*, at 476, 490. Memories of the pre-*Miranda* prior period have dimmed for many lawyers and many judges.

The majority and the dissent in the Fourth Circuit discussed at length whether the *Miranda* warnings are required by the Constitution. At bottom, this is a fruitless scholastic debate over nomenclature. All sides agree that, in *Miranda*, this Court established a functional requirement as to the level of protection that must be met in order to preserve the rights of subjects of custodial interrogations. While the precise words of the *Miranda* warnings are not constitutionally required, in order to devise an alternative protocol that satisfies the Fifth Amendment, a State government or Congress must establish procedures that provide a degree of protection against involuntary confessions that is greater than or equal to that provided by the classic formulation of the four *Miranda* statements. The statute on which the Fourth Circuit relied, 28 U.S.C. § 3501, plainly does not provide the required level of protection and therefore cannot, by itself, provide a constitutionally sufficient basis for admission of a custodial confession in the prosecution's case-in-chief. For this reason, regardless of the taxonomic category in which one places the *Miranda* warnings, the position of the United States should be sustained.

Rather than discuss this issue, which will be covered at length by the Solicitor General and the amicus party who participated below, this Brief *Amicus Curiae* will present two issues that are not addressed by the parties. First, the current *Miranda* warnings are of substantial benefit to Federal *prosecutors* in the administration of the criminal laws. By reviewing whether the police have complied with four bright-line rules before conducting custodial interrogations, Federal prosecutors can determine efficiently, and with a high degree of accuracy, whether the defendant's confession is likely to be admitted into evidence and thus whether the government

possesses sufficient admissible evidence to warrant proceeding with a criminal charge.

Second, the court of appeals violated the principle of separation of powers by considering the question whether Dickerson's confession was admissible under Section 3501, when the United States made a considered decision not to attempt to justify its admission on that basis. Under the Constitution, the President, acting through his delegate the Attorney General and her subordinates, has exclusive authority to enforce the criminal laws. As long as the prosecutor does not exceed legal or constitutional limitations, the Department of Justice has unreviewable discretion as to whether to initiate a prosecution, the terms under which a prosecution will be conducted, the evidence that will be presented in support of a charge, and whether to dismiss a prosecution.

The Attorney General has formally informed Congress that the Department of Justice believes that Section 3501 is unconstitutional and that it will not argue for admission under that provision of confessions that violate the *Miranda* warnings. The decision by the prosecution in this case, not to argue before the court of appeals for admission of Dickerson's statement on the basis of Section 3501, was a considered application of the general Executive Branch policy. The Fourth Circuit has usurped the exclusive authority of the Executive Branch to determine how to prosecute this criminal case, in overturning the suppression decision under Section 3501 in response to an argument made by an amicus that contradicted the express policy decision of the Department of Justice not to seek admission of the confession on that basis.

ARGUMENT

I. THE *MIRANDA* RULES AID THE ENFORCEMENT OF FEDERAL CRIMINAL LAWS BY FACILITATING DECISIONS BY PROSECUTORS CONCERNING WHICH CRIMINAL CASES SHOULD BE PURSUED.

Miranda prevents the introduction in the prosecutor's case-in-chief of statements obtained from the defendant in a custodial interrogation, unless the suspect was given prescribed warnings and knowingly waived his rights to remain silent and to have legal counsel.

A Federal prosecutor, seeking to determine whether the government has sufficient evidence to prosecute and obtain a conviction against a suspect, derives substantial benefits from the *Miranda* rules. The easily understood, bright-line nature of the tests provides the prosecutor with a highly reliable mechanism for determining whether statements made during a custodial interrogation will be found to be voluntary and thus be deemed admissible at trial. With a clear understanding as to whether this critical aspect of the government's proof is admissible, the prosecutor may make an informed judgment as to whether the government has enough information to initiate a criminal proceeding and whether it must obtain additional information about the defendant and the crime in order to increase its prospects of obtaining a conviction at trial.

By contrast, under a totality-of-the-circumstances approach to admission of a custodial confession, a Federal prosecutor faces a more difficult calculus, whose results are less predictable. The prosecutor must weigh whether a Federal district judge will determine that the defendant's statement was

made in a custodial setting; whether the police properly apprised the defendant of his rights; and whether, balancing all the aggravating and extenuating factors surrounding the interrogation, the judge is likely to admit the evidence or preclude its admission in the government's case-in-chief.

At a minimum, a totality-of-the-circumstances regime would generate increased litigation over the admissibility of statements made by criminal defendants during interrogation. This would impose increased time and resource demands on United States Attorneys and their assistants. Further, Federal prosecutors would no longer be able to verify, quickly and with minimum investigation costs, whether Federal law enforcement personnel had properly warned the defendant before taking his statement. Therefore, uncertainty and a risk of error would be introduced into the prosecutor's pre-trial determination as to whether the government has a case that would prove guilt beyond a reasonable doubt. The clearest showing on this point is the extensive litigation over the voluntariness issue that occupied the Federal courts of appeals and this Court in the years immediately before *Miranda* was decided.

In sum, the benefits of the current *Miranda* protocols to Federal prosecutors, and the problems for the prosecution that would be reintroduced by a return to a totality-of-the-circumstances regime, counsel strongly that the Court should follow the doctrine of *stare decisis* and reject the argument that Section 3501, rather than *Miranda*, governs admission of custodial confessions in Federal criminal trials.

II. THE COURT OF APPEALS VIOLATED THE PRINCIPLE OF SEPARATION OF POWERS AND USURPED EXECUTIVE AUTHORITY, BY BASING ITS DECISION ON A GROUND THAT THE EXECUTIVE BRANCH EXPLICITLY DECLINED TO INVOKE.

In *Davis v. United States*, 512 U.S. 452 (1994), the Court declined, as a prudential manner, the invitation of an *amicus curiae* that it consider whether a confession that was not obtained in compliance with *Miranda* could nonetheless be admitted under Section 3501. *Id.*, at 457-458 n. *. Since that time, the Attorney General has formally notified Congress, pursuant to 2 U.S.C. § 288k(b), that the Department of Justice will not defend the constitutionality of Section 3501. In the appeal to the Fourth Circuit, no party in this criminal prosecution raised the issue of whether Section 3501 provided an independent ground for admission of Dickerson's statement or whether the statute, if so applied, was constitutional.

Under these circumstances, the Fourth Circuit violated the principle of separation of powers in addressing the admissibility of the confession under Section 3501, when the question was not presented by either the prosecution or the defendant. By ignoring the Attorney General's explicit decision that the Department of Justice would not argue in any case that Section 3501 permitted admission of a confession that was invalid under *Miranda*, the court of appeals usurped the exclusive, discretionary authority of the Executive Branch to determine how it would prosecute this criminal case.

The Executive Branch, no less that the Judiciary, has a sworn duty to uphold the Constitution. That duty requires

Executive Branch prosecutors not to assert legal arguments that are inconsistent with the Constitution. Where, as here, mature consideration persuades the Attorney General that a statute is unconstitutional, the Executive Branch should not seek to enforce it, and the courts are without authority to force prosecutors to rely on a potential argument in support of their case that they have determined not to use. Review of the Department's policy decision rests with Congress. If Congress has a different view, Congress has remedies through its powers of oversight, appropriations, confirmation and impeachment. There is no need for the Judiciary to intervene to, in effect, provide an advisory opinion on the issue.

A. Governing Legal Authority.

Art. II, § 1 of the Constitution provides that the "executive Power shall be vested in a President of the United States of America." Art. II, § 3 further states that the President "shall take care that the laws be faithfully executed . . . ." These provisions establish the core of the President's constitutional responsibility to enforce the criminal laws, an area that the Court has characterized as a "special province" of the Executive. *United States v. Armstrong*, 517 U.S. 456, 464 (1996), quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

The Executive Branch "has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). Neither the Judicial nor Legislative Branches may interfere with the discretion of the Executive by directing the Department of Justice to prosecute particular individuals or by dictating the

positions that the United States shall take in prosecuting those cases.[2]

The Attorney General and her subordinates, including the United States Attorneys, have broad discretion to enforce the criminal laws, because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to take care that the laws be faithfully executed. 28 U.S.C. §§ 516, 547; *Armstrong*, 517 U.S. at 464. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888); *The Grey Jacket*, 72 U.S. (5 Wall.) 370 (1866). *See* 2 Op. Att'y Gen. 482, 486 (1831)(the President has supervisory power over the prosecution of lawsuits by United States Attorneys as a necessary consequence of the duty to take care that the laws be faithfully executed).

As then Judge (later Chief Justice) Burger stated in *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967):

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

The broad scope of the Attorney General's discretion was further confirmed in *United States v. Cox*, 342 F.2d 167

---

[2] *See United States v. Thompson*, 251 U.S. 407, 412-13 (1920)(the Executive Branch has an absolute right to determine whether to initiate prosecutions for crime, which is not subject to control by judicial discretion); *Ex parte United States*, 287 U.S. 241 (1932) (district court may not refuse to issue arrest warrant after indictment, because this would negate the absolute right of the Executive Branch to prosecute).

(5th Cir.)(en banc), *cert. denied*, 381 U.S. 935 (1965). There, the court overturned a district court order that the United States Attorney must file an indictment that the grand jury had voted to return.

> The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings, and in the prosecution of offenses, be faithfully executed. . . . The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. . . . [I]t is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171. In a concurring opinion concerning the application of the former Independent Counsel Act, Judge Bork also explained:

> the principle of Executive control extends to all phases of the prosecutorial process. . . . If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which

> the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive.

Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984)(per curiam)(Bork, J., concurring).

Article III gives Federal courts the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before the court for resolution. *Muskrat v. United States*, 219 U.S. 346, 356 (1911). This Court consistently has taken a strict approach to defining the powers of Article III courts, in part to safeguard the independence of the Judiciary against encroachments by the other Branches, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982), but also from the recognition that the courts should not interfere with authority "committed by the Constitution to another branch of government." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Article III courts possess the authority, of course, to make certain that Federal prosecutors do not exceed legal or constitutional limitations in investigation or prosecution of crimes. This Court's prior decisions establish, however, that so long as the United States Attorney is operating within the proper sphere of his or her authority in prosecuting a crime, the Judicial Branch may not interfere with the discretion of the Executive as to how it will seek to enforce the law. This principle of judicial non-interference extends to such basic subjects as what evidence to introduce, what witnesses to call, or what legal arguments the prosecutor will present in opposition to defense motions to suppress evidence. Interference by an Article III court with the prosecutor's

discretion on these basic questions impinges upon the Executive's constitutionality authority.

B. The Decision by the Court of Appeals, to Overturn the Suppression of the Defendant's Statement on a Ground that the Executive Branch Expressly Chose Not to Present, Violated the Principle of Separation of Powers.

In accepting an invitation by an amicus to consider whether Dickerson's confession was admissible under Section 3501, an issue that was not presented by either the prosecution or the defendant in this criminal prosecution, the court of appeals violated the principle of separation of powers.

In considering an argument raised only by an amicus and deliberately not presented by the prosecution, the Fourth Circuit intruded into an area of discretion reserved to the Executive Branch and impaired the discharge of a constitutional function assigned to the President and his subordinates. The function of determining what evidence to introduce in a criminal prosecution, and what authority to bring to bear to justify actions by Federal law enforcement personnel, is inherently Executive in nature, and is not analogous to the functions that Federal courts perform in any other context. The action of the court of appeals therefore should be overturned as inconsistent with Article III.

In considering an argument for admissibility that the Attorney General has refused to offer in any Federal court, the court of appeals intruded into the power of the Executive to determine how potential evidence will be utilized in a criminal prosecution and what arguments will be made in support of its

admission. It thereby violated the principle of separation of powers because it reduced the ability of the Department of Justice to control the prosecutorial powers that the Executive, and the Executive alone, may exercise.

This is, in Justice Scalia's phrase, an issue that has come before the Court "clad . . . in sheep's clothing," *Morrison v. Olson*, 487 U.S. 654, 699 (1988)(Scalia, J., dissenting), because the immediate effect of the lower court's intrusion into the sphere reserved for Executive authority would be the admission of Dickerson's statement. Whatever the short-term effect in this case, there is no assurance that in other cases, the effect of similar judicial intrusions would be benign. The lower court's unprecedented assumption of the power to second guess prosecutorial decisions about the evidence to be presented in a criminal case and the grounds to be argued for its admissibility is conceptually no different from assertion of a judicial right to review Department of Justice decisions about whom to prosecute, and for what offenses, in circumstances in which the Executive has made a considered decision not to file charges.

In this connection, it is significant that the Fourth Circuit's rationale for reaching out to decide the Section 3501 issue was its assertion that, by "elevating politics over law," the Department of Justice prohibited the local prosecutor from arguing that Dickerson's confession was admissible under the statute. 166 F.3d at 672. This claim is answered by Justice Scalia's observation that:

> Almost all investigative and prosecutorial decisions – including the ultimate decision whether . . . prosecution is warranted – involve the balancing of innumerable legal and practical considerations. Indeed, even political

> considerations (in the nonpartisan sense) must be considered . . . . [T]he balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion.

Morrison v. Olson, 487 U.S. at 707-708 (Scalia, J. dissenting).

In sum, by asserting a right to invoke *sua sponte* an argument for admissibility not raised by the prosecution in this criminal case -- indeed, deliberately rejected by the Attorney General on a nationwide basis -- the Fourth Circuit has impermissibly undermined the discretionary authority of the Executive Branch to enforce the law as it sees fit, within legal and constitutional boundaries, and has thereby interfered with the Executive's ability to accomplish an important function assigned to it by the Constitution.[3]

Although an Article III court may not consider the constitutionality of Section 3501 in a criminal case in which the Executive Branch determines not to raise this argument for admission of the suspect's custodial statement, this does not

---

[3] This case is in a fundamentally different posture from the hypothetical situation discussed by Justice Scalia in *Davis v. United States*, where he asserted that "once a prosecution has been commenced and a *confession introduced*, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law." 512 U.S. at 465 (Scalia, J. concurring) (emphasis added). This statement, by its terms, applies only after the confession has been introduced, and the defendant is challenging an alleged violation of his right to a fair trial. The situation before the Fourth Circuit was different, because the incriminating statement was never entered into evidence. The case thus remained in a posture where the prosecution has full discretionary authority over the evidence to be introduced and the arguments to be made in support of admission of its own evidence.

mean that the Department of Justice's position is immune from review under our political system. It is subject to review, but in other forums – by Congress and ultimately by the people at election time. In particular, Congress may exercise its oversight authority and the power of the purse to try to influence the Executive Branch's policy position. Upon the appointment of a new Attorney General or her Assistant Attorneys General, the Senate may exercise its power to advise and consent. Finally, if Congress so choses, it can initiate impeachment proceedings based on an assertion of dereliction of duty.

Further, the Fourth Circuit's decision to reach out to consider the relationship between Section 3501 and *Miranda* appears to have been based on the calculation that, if the court did not decide the question in this case, this important legal issue, which has been framed by academics for many years, would continue to evade judicial resolution. Its decision is erroneous for two reasons. First, as the dissenting judge below correctly observed:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

166 F.3d at 697.

Second, there is no reason for Article III courts to reach out to decide this issue prematurely. A future President may exercise his or her discretion to reverse the policy decision of

prior Administrations and to seek to enforce Section 3501 in the manner recommended by the amicus below. If and when that happens, there will be ample occasion at that time for the Judicial Branch to consider the proper relationship between the law and the Fifth Amendment, as interpreted in *Miranda*, upon the appeal of one of the parties to a criminal case. Until a future President makes that determination and the issue of voluntariness under a totality-of-the-circumstances test is presented by an actual dispute between the prosecution and a criminal defendant, the Court should not disrupt the proper relationship between the Branches and prevent the Executive Branch from exercising the power to enforce the criminal laws that is confided in it by the Constitution.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* Benjamin R. Civiletti respectfully submits that the judgment below should be reversed and that the Court should decline, on separation of powers grounds, to decide whether Dickerson's confession may be admitted under Section 3501, since neither of the two parties to this criminal prosecution has raised that question and it therefore falls outside the power of Article III courts to consider. Should the Court reach the merits, it should hold that Section 3501 does not trump the *Miranda* decision and reverse the judgment of the court of appeals.

Respectfully submitted,

Benjamin R. Civiletti
Kenneth C. Bass, III
(Counsel of Record)
John F. Cooney
Venable, Baetjer, Howard
& Civiletti LLP
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Counsel for Amicus Curiae

January 28, 2000

Jan 28 2000 (15)

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-5525

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE*, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, SUPPORTING PETITIONER

MICHELLE FALKOFF
KATE J. STOIA
BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market
San Francisco, California
94105
(415) 442-0900

CHARLES D. WEISSELBERG
CENTER FOR CLINICAL EDUCATION
UNIVERSITY OF CALIFORNIA
SCHOOL OF LAW (BOALT HALL)
Berkeley, California
94720-7200
(510) 643-8159
(*Counsel of Record*)

Attorneys for *Amicus Curiae*
The National Legal Aid and Defender Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

41pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

MIRANDA'S BRIGHT-LINE RULES PROTECT THE FIFTH AMENDMENT PRIVILEGE AND SHOULD NOT BE CAST ASIDE 5

A. *Miranda* Protects the Fifth Amendment Privilege by Reducing the Compelling Pressures Inherent in a Custodial Interrogation 5

1. *Miranda* protects the ability to choose between speech and silence 5

2. Custodial interrogations still contain inherently compelling pressures 9

B. *Miranda*'s Procedures Are the Minimum Necessary to Counter the Compelling Pressures in a Custodial Interrogation and Thus Protect the Fifth Amendment Privilege 14

C. *Miranda*'s Rule is Not Amenable to a Cost-Benefit Analysis 16

1. The Purported "Costs" And "Benefits" Of *Miranda* Are Incommensurate 17

2. There Is No Reliable Measure of *Miranda*'s "Costs" 18

a. Pre- And Post-*Miranda* Confession Rates Do Not Provide A Reliable Measure Of "Costs" 18

TABLE OF CONTENTS – Continued

Page

b. Clearance Rates Do Not Provide A Reliable Measure of "Costs" 24

3. There Is No Reliable Measure of the "Costs" of Section 3501 or Alternative Regimes 26

CONCLUSION 29

STATUTORY APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Roberson, 486 U.S. 675 (1988) 27

Boykin v. Alabama, 395 U.S. 238 (1969) 8

Brady v. United States, 397 U.S. 742 (1970) 8

California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999), *amended*, 2000 WL 1639 (9th Cir. 2000) 7

Colorado v. Spring, 479 U.S. 564 (1987) 5

Connecticut v. Barrett, 479 U.S. 523 (1987) 7

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992) 27

Crosby v. United States, 506 U.S. 255 (1993) 8

Cross v. United States, 323 F.2d 629 (D.C. Cir. 1963) 8

Davis v. United States, 512 U.S. 452 (1994) 9, 26

Duckworth v. Eagan, 492 U.S. 195 (1989) 6

Edwards v. Arizona, 451 U.S. 477 (1981) 6, 7

Faretta v. California, 422 U.S. 806 (1975) 8

Gideon v. Wainwright, 372 U.S. 335 (1963) 25

Mapp v. Ohio, 367 U.S. 643 (1961) 25

Michigan v. Tucker, 417 U.S. 433 (1974) 8, 28

Minnick v. Mississippi, 498 U.S. 146 (1990) 27

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 5, 6, 9, 27

New York v. Quarles, 467 U.S. 649 (1984) 27

TABLE OF AUTHORITIES – Continued

Page(s)

Patterson v. Illinois, 487 U.S. 285 (1988) 8

Patton v. United States, 281 U.S. 276 (1930) 8

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 8, 27

Stansbury v. California, 511 U.S. 318 (1994) 9

State v. Hermes, 904 P.2d 587 (Mont. 1995) 11

United States v. Dickerson, 971 F. Supp. 1023 (E.D. Va. 1997) 2

United States v. Mandujano, 425 U.S. 564 (1976) 8

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution ..... *passim*

Sixth Amendment to the United States Constitution 1

Fourteenth Amendment to the United States Constitution 25

STATUTES

18 U.S.C. § 3501 ..... *passim*

OTHER AUTHORITIES

Bureau of Justice Statistics, *Correctional Populations in the United States, 1996* 6

Cassell, Paul G. & Fowles, Richard, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998) 24, 25, 26

TABLE OF AUTHORITIES – Continued

Page(s)

Cassell, Paul G. & Hayman, Bret S., *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. Rev. 839 (1996) 17, 21, 23

Cassell, Paul G., *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 Nw. U. L. Rev. 1084 (1996) 24

Cassell, Paul G., Miranda's *Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996) 19, 20, 22, 28

Cassell, Paul G., *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 Ariz. St. L. J. 299 (1996) 24

Compendium of Federal Justice Statistics, 1997 6

Donohue III, John J., *Did* Miranda *Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147 (1998) 24, 25

Gudjonsson, Gisli, The Psychology of Interrogations, Confessions and Testimony (1992) 9

Gudjonsson, Gisli H. & MacKeith, James, *Disputed Confessions and the Criminal Justice System*, Maudsley Discussion Paper No. 2, Instit. of Psychiatry, London (1997) 14

Gudjonsson, Gisli H., Kopelman, Michael D. & MacKeith, James A.C., *Unreliable admissions to homicide: A case of misdiagnosis of amnesia and misuse of abreaction technique*, 174 British J. of Psychiatry 455 (1999) 14

TABLE OF AUTHORITIES – Continued

Page(s)

Inbau, Fred E. & Reid, John E., Criminal Interrogation and Confessions (2d ed. 1967) 10, 11

Inbau, Fred E., Reid, John E. & Buckley, Joseph P., Criminal Interrogation and Confessions (3d ed. 1986) 9

Jayne, Brian C. & Buckley, Joseph P., *Criminal Interrogation Techniques on* Trial, Prosecutor 23 (Fall 1991) 12

Kamisar, Yale, Editorial, *Landmark Ruling's Had No Detrimental Effect*, Boston Globe, Feb. 1, 1987, A27 20

Kamisar, Yale, *The Warren Court and Criminal Justice, in* The Warren Court 116 (B. Schwartz ed., 1996) 16

Kassin, Saul M. & Fong, Christina T., *"I'm Innocent!" Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 Law & Hum. Behav. 499 (1999) 10

Kassin, Saul M. & Kiechel, Katherine L., *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychology Sci. 125 (1996) 14

Kassin, Saul M. & McNall, Karlyn, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233 (1991) 13

Leo, Richard A. & White, Welsh, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing With the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397 (1999) 19

TABLE OF AUTHORITIES – Continued

Page(s)

Leo, Richard A., *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996) 12, 13

Leo, Richard A., Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 Law & Society Rev. 259 (1996) 13

McConville, Mike, *Videotaping Interrogations: police behaviour on and off camera*, [1992] Crim. L. R. 532 29

Monaghan, Henry P., *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 15

Ofshe, Richard J. & Leo, Richard A., *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. L. Rev. 979 (1997) 14

Royal, Robert F. & Schutt, Steven R., The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide (1976) 12

Schulhofer, Stephen J., Miranda *and Clearance Rates*, 91 Nw. U. L. Rev. 278 (1996) 24, 25

Schulhofer, Stephen J., Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996) ..... *passim*

Statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States Before the Comm. on the Judiciary, United States Senate, on S.173, The "Crime Victims Restitution Act of 1995," Nov. 8, 1995 6

Stone, Geoffrey R., *The* Miranda *Doctrine in the Burger Court*, 97 Sup. Ct. Rev. 99 (1977) 16

TABLE OF AUTHORITIES – Continued

Page(s)

Stuntz, William J., *Waiving Rights*, 75 Va. L. Rev. 761 (1989) 7

Thomas III, George C., *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. Rev. 933 (1996) 21, 23

Weisselberg, Charles D., *Saving* Miranda, 84 Cornell L. Rev. 109 (1998) 7, 16

White, Welsh S., *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105 (1997) 10

Witt, James W., *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. Crim. L. & Criminology 320 (1973) 22

Yarmey, A. Daniel, Understanding Police and Police Work: Psychosocial Issues (1990) 12

Young, Deborah, *Unnecessary Evil: Police Lying in Interrogations*, 28 U. Conn. L. Rev. 425 (1996) 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the National Legal Aid and Defender Association (NLADA), is a private, non-profit membership organization, founded in 1911. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems and legal services agencies around the nation. The NLADA's primary purpose is to assist in affording effective legal services to people unable to retain counsel, as the Fifth and Sixth Amendment right to counsel enables poor people in our criminal justice system to assert all of their other rights.

This case asks the Court to decide whether federal investigators are bound by the procedures set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). The NLADA has a profound interest in this issue. While this Court in *Miranda* declined to require the presence of counsel for an accused during a custodial interrogation, *Miranda* at least ensures that a suspect be informed of his or her Fifth Amendment privilege and have a continuous opportunity to assert it. This knowledge and opportunity are both critically important for the indigent and often ill-

---

[1] No counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amicus Curiae* with the assistance of Jennifer A. Cartee and Michael Zara, students at the University of California School of Law (Boalt Hall). No one other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation or sumission of the brief.

Both Petitioner and Respondent have consented to the filing of this brief.

educated clients served by the NLADA's members. Further, abandoning *Miranda*'s bright-line rules would relegate police, prosecutors, defense counsel and courts to the days before 1966, when all found it difficult to discern when a constitutional line had been crossed during a police interrogation.

STATEMENT OF THE CASE

On January 27, 1997, FBI agents and a city police detective went to Charles Dickerson's home to investigate a bank robbery. *See* Pet. App. 3a. Mr. Dickerson returned to the FBI Field Office with them and was questioned. *See id.* He denied any involvement in the robbery. *See id.* Agents arranged for a search warrant and they told Mr. Dickerson that they were about to search his apartment. *See* Pet. App. 4a. At that point, Mr. Dickerson made a statement. *See id.* The district court ruled that Mr. Dickerson's statement came before agents administered the warnings required by *Miranda v. Arizona*. *See* Pet. App. 5a. The district court therefore suppressed the statement (*see id.*), and subsequently denied cross motions for reconsideration. *See United States v. Dickerson*, 971 F. Supp. 1023, 1025 (E.D. Va. 1997).

The government filed an interlocutory appeal. *See* Pet. App. 3a, 6a. The United States Court of Appeals for the Fourth Circuit reversed. *See* Pet. App. 19a. While the government did not urge this point (*see* Pet. App. 8a-9a), the court of appeals found that the admissibility of Mr. Dickerson's statement was governed by a statute, 18 U.S.C. § 3501, and not by this Court's ruling in *Miranda*.

See Pet. App. 17a. Judge Michael dissented from this portion of the opinion. *See* Pet. App. 25a. Although the district court did not assess whether Mr. Dickerson's statement was voluntary under the specific factors set forth in 18 U.S.C. § 3501(b), the court of appeals ruled that Mr. Dickerson's statement was voluntary and should be admitted. *See* Pet. App. 17a.

SUMMARY OF ARGUMENT

Miranda v. Arizona provides a bright line that protects suspects' Fifth Amendment rights and, at the same time, affords law enforcement officers a means to avoid compulsion in custodial interrogations. The *Miranda* rule operates by reducing the compelling pressures that are inherent in a custodial interrogation. As this Brief explains, recent studies of interrogation practices confirm that these pressures continue to exist.

Given the pressures that are always part of an in-custody interrogation, *Miranda* properly holds that certain safeguards are needed to protect the Fifth Amendment privilege. *Miranda*'s procedures are the minimum required by the Constitution because no person may make an unfettered decision whether to speak or remain silent unless officers inform that person of his or her rights and indicate that the exercise of those rights will be respected. Although a legislature may craft an alternative to *Miranda*, any proposed replacement must be equally effective in apprising a suspect of the right to remain silent and in assuring that the exercise of that right will be honored.

The statute at hand, 18 U.S.C. § 3501, must fall because it does not include any safeguards – much less equally-effective safeguards – to ensure that a suspect is informed of the right to remain silent and can exercise that right. Nor does § 3501 set out a clear rule to enable law enforcement or officers of the court to determine when a Fifth Amendment violation may occur. For this reason, the statute is likely to lead to many more forced confessions, which will disproportionately impact the indigent clients served by *Amicus Curiae*'s members.

Some of *Miranda*'s critics, particularly Professor Paul G. Cassell, have attempted to determine *Miranda*'s "costs." *Amicus Curiae* rejects the notion that *Miranda*'s impact can be seen as a hurtful "cost," or that it is detrimental to our society for officers to tell suspects about their rights. However, even if a cost-benefit analysis might apply to *Miranda* in theory, it is not possible to do so in practice. *Miranda*'s rule is not amenable to a cost-benefit analysis, as the "costs" and "benefits" of *Miranda* are incommensurate. Moreover, there is still no reliable measure of *Miranda*'s costs: analyses of confession and clearance rates are incomplete, contain inaccurate information, and are subject to manipulation. As a result, we have no sure way to calculate the "costs" of *Miranda;* nor, for that matter, may we estimate with certainty the "costs" of implementing § 3501. One "cost" we may surely anticipate, however, is increased litigation over the voluntariness of statements given to the police.

ARGUMENT

MIRANDA'S BRIGHT-LINE RULES PROTECT THE FIFTH AMENDMENT PRIVILEGE AND SHOULD NOT BE CAST ASIDE

A. *Miranda* Protects the Fifth Amendment Privilege by Reducing the Compelling Pressures Inherent in a Custodial Interrogation

1. *Miranda* protects the ability to choose between speech and silence

The Court in *Miranda v. Arizona* described the privilege against self-incrimination as necessary "[t]o maintain a 'fair state-individual balance,' to require the government to shoulder the entire load," and to respect individual autonomy. 384 U.S. 436, 460 (1966) (citations omitted). The procedures set out in *Miranda* are the minimum necessary to safeguard a suspect's Fifth Amendment privilege. As the Court held, without these procedures or others "which are at least as effective," the process of in-custody interrogation "contains inherently compelling pressures" that undermine the privilege. *Id.* at 467. *Miranda* creates an environment in which a suspect can make an informed decision whether to assert or waive the Fifth Amendment privilege, and *Miranda* does so in two ways.

First, *Miranda* demands that officers provide a suspect with a modicum of information about the right to remain silent and the right to counsel. *See id.* at 467-72. This does not require police to disclose all of the information that a person might want before choosing between speech and silence. *See, e.g., Colorado v. Spring*, 479 U.S. 564, 573-77 (1987) (officers do not have to divulge the subject matter of the interrogation); *Moran v. Burbine*, 475

U.S. 412, 425 (1986) (officers are not required to disclose that a suspect's lawyer is trying to reach him). Nor must the warnings be precise; it is sufficient for officers to "touch[ ] all of the bases." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). Nevertheless, without warning a suspect of the right to remain silent and the right to counsel, no waiver of the privilege can be deemed informed. *See Miranda*, 384 U.S. at 468-72. The warnings are particularly important for poor, ill-educated or disabled persons accused of crimes, people for whom the NLADA holds a special concern.[2] Even so, "[i]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations." *Id.* at 468.

Second, *Miranda*, coupled with *Edwards v. Arizona*, 451 U.S. 477 (1981), requires officers to honor a suspect's

---

[2] "Eighty-five percent of all federal criminal defendants are indigent at the time of their convictions." *Statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States Before the Comm. on the Judiciary, United States Senate, on S.173, The "Crime Victims Restitution Act of 1995," Nov. 8, 1995*, at 2. According to a 1996 survey of inmates in local jails, 76.6% of those convicted of felonies and 56.3% of those convicted of misdemeanors were represented by court-appointed counsel. *See* Bureau of Justice Statistics, *Correctional Populations in the United States, 1996*, tbl. 4.9. 46.5% of the jail inmates had not graduated from high school. *See id.* at tbl. 4.1. Of the defendants convicted of federal offenses in a recent year, 41.5% had not graduated from high school. *See* Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1997*, tbl. 3.5. Almost half (47.6%) had no prior convictions. *See id.* One-fourth (25.6%) of the local jail inmates in the 1996 survey had received mental health services because of a mental or emotional problem. *See Correctional Populations, supra*, tbl. 4.22.

decision to invoke the privilege.[3] In *Connecticut v. Barrett*, Chief Justice Rehnquist wrote for the Court that "[t]he fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.' " 479 U.S. 523, 528 (1987) (quoting *Miranda*, 384 U.S. at 469). *Miranda* furthers this purpose by fostering absolute respect for a limited zone of autonomy in a custodial interrogation. A suspect who waives the Fifth Amendment may be questioned at length, though *Miranda* gives the suspect the right to curtail the interrogation if these tactics prove too discomforting. Indeed, *Miranda* may dampen the use of overbearing tactics because it gives officers an incentive not to make the interrogation so difficult that a suspect will ask for a lawyer. *See* William J. Stuntz, *Waiving Rights*, 75 Va. L. Rev. 761, 820-21 (1989).

While one might propose safeguards that provide greater protection for the Fifth Amendment privilege, the privilege may not survive with less. *See infra* at arg. B. Given the pressures that are always present in a custodial interrogation, no waiver of the privilege against self-

---

[3] Some law enforcement agencies have recently trained officers that *Miranda* and *Edwards* are hortatory, not mandatory. *See California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1041, 1049-50 (9th Cir. 1999), *amended*, 2000 WL 1639 (9th Cir. 2000); Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 132-40, 189-92 (1998). *Amicus Curiae* suggests that this case affords the Court an opportunity to make plain that when a suspect in custody invokes the Fifth Amendment, questioning must cease.

incrimination can be effective unless officers affirmatively tell a suspect that he or she has the right to remain silent and to have the assistance of counsel, and indicate that the police are prepared to respect the suspect's choice. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court ruled that officers need not advise a suspect of the right to refuse consent to search, but specifically distinguished cases involving police interrogation.[4] Consent searches, the Court held, are "immeasurably far removed from 'custodial interrogation' " (*id.* at 232) because "the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation." *Id.* at 247.[5]

---

[4] Because a waiver of Fifth Amendment rights in the station house may affect the integrity of the fact-finding process in court, the Court has treated *Miranda* waivers similar to waivers of trial-type rights. *See Bustamonte*, 412 U.S. at 238-41; *see also Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974) (the inability to protect the Fifth Amendment privilege at one stage of a proceeding may make its invocation useless at a later stage). This Court has generally upheld a waiver of a trial-type right only if the accused was aware of the existence of that right. *See, e.g., Brady v. United States*, 397 U.S. 742, 748, 756 (1970) (right to trial); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (same); *Patton v. United States*, 281 U.S. 276, 312-13 (1930) (right to a jury); *Crosby v. United States*, 506 U.S. 255, 261-62 (1993) (right to be present at trial); *Cross v. United States*, 323 F.2d 629, 633 (D.C. Cir. 1963) (same); *Faretta v. California*, 422 U.S. 806, 835 (1975) (right to counsel at trial); *Patterson v. Illinois*, 487 U.S. 285, 296 (1988) (right to counsel during post-indictment questioning).

[5] *See also United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (*Miranda* warnings need not be given to a grand jury witness because of the marked contrast between a grand jury proceeding and a custodial interrogation).

2. Custodial interrogations still contain inherently compelling pressures

In *Miranda*, this Court stressed "that the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. Following a careful review of police practices (*id.* at 448-57), the Court concluded that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458. As set forth below, this conclusion remains valid; studies confirm that compelling pressures still are part and parcel of a custodial interrogation.

After *Miranda*, officers were trained to give suspects the required warnings, but most of the other tactics used during interrogations have not changed. This is perhaps most evident from the introduction to the second edition of Inbau and Reid's highly-influential training manual,[6] published in the immediate wake of *Miranda*:

---

[6] The first edition of the manual, Criminal Interrogation and Confessions was featured prominently in *Miranda*. *See* 384 U.S. at 449-55. The manual is currently in its third edition. *See* Fred E. Inbau, John E. Reid & Joseph P. Buckley, Criminal Interrogation and Confessions (3d ed. 1986). Various editions are referenced in a number of this Court's cases. *See, e.g., Davis v. United States*, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (per curiam); *Moran v. Burbine*, 475 U.S. at 459 n.45 (Stevens, J., dissenting). According to one of the world's leading experts on the psychology of interrogation, "[a]lthough many police interrogation manuals have been produced . . . , undoubtedly the most authoritative and influential manual is the one written by Inbau, Reid and Buckley." Gisli Gudjonsson, The Psychology of Interrogations, Confessions and Testimony 31 (1992); *see also*

> As we interpret the . . . decision of the Supreme Court of the United States in *Miranda v. Arizona*, all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel.

Fred E. Inbau & John E. Reid, Criminal Interrogation and Confessions 1 (2d ed. 1967).

The current edition of the manual advocates a multi-step approach to the interrogation of a suspect whose guilt appears "definite" or "reasonably certain" to police. Inbau, Reid & Buckley, *supra*, at 78.[7] The first step is "direct, positive confrontation." *Id.* at 84-93. Next, interrogators develop and maintain a theme. Some themes are designed to soften up a suspect (suggesting, for example, that a crime was morally justified); other themes are more

---

Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 118 (1997) (it is "[t]he most widely used manual"); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 U. Conn. L. Rev. 425, 431 n.31 (1996) (it is "the best known manual on police interrogations").

[7] Officers are trained to rely on nonverbal cues to help distinguish between denials made by those who are innocent and those who are guilty. *See* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!" Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 Law & Hum. Behav. 499, 500 (1999). However, this training has not been shown to increase accuracy in assessing truth or falsity. *See id.* at 511.

contentious and seek to convince the suspect that remaining silent merely postpones the inevitable.[8] The interrogator must deal with the suspect's expected denials. The accused should not be permitted to continue to deny involvement, for this would give him "psychological fortification." *Id.* at 142-44. "In some instances, it may become necessary for the interrogator to feign annoyance as a tactic to stop a guilty suspect from repeating [the] denial." *Id.* at 147.[9] After the accused's resistance is weakened, interrogators must still increase the person's desire to confess. According to followers of this model of interrogation:

> One way to accomplish this objective is to express a concern to the suspect that if he does not tell the truth people may make false assumptions about why he committed the crime.

---

[8] *See, e.g., id.* at 97-99 (sympathize with the suspect); *id.* at 99-101 (reduce feelings of guilt by minimizing moral seriousness of the offense); *id.* at 102-06 (suggest a less revolting and more acceptable motivation for the offense); *id.* at 106-18 (blame the victim, accomplice, or anyone else); *id.* at 120-25 (suggest that victim may have exaggerated, and the truth can only be learned from the suspect); *id.* at 126-27 (point out futility of continued criminal behavior); *id.* at 128-19 (get an admission of lying about an incidental aspect of the offense, and then use this lie against the suspect in the interrogation); *id.* at 130 (have the suspect place himself or herself at the scene); *id.* at 131 (convince the suspect that the evidence is overwhelming and there is no point in denying involvement); *id.* at 132-36 (play one suspect against another).

[9] Preventing an accused from asserting innocence can easily lead to a compelled statement. *See State v. Hermes*, 904 P.2d 587, 589 (Mont. 1995) (statement was involuntary where, *inter alia*, the interrogating officer structured his questions so that the defendant could not effectively deny his involvement).

> The technique culminates by asking the suspect "alternative questions" which offer two descriptions about some aspect of the crime. The alternative questions are phrased so that either choice is incriminating.

Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on* Trial, Prosecutor 23, 28 (Fall 1991) (footnote omitted).[10]

Richard Leo's study of police interrogations in three cities confirms the use of these techniques. He tracked the tactics employed by officers during 182 interrogations, and reported the percentage of interrogations in which they were used. Some of the tactics used frequently were confronting the suspect with evidence of guilt (85% of interrogations), undermining the suspect's confidence in denial (43%), identifying contradictions in the story (42%), offering moral justifications or excuses (34%), confronting with false evidence of guilt (30%), and minimizing the moral seriousness of the offense (22%). *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L.

---

[10] Other interrogation manuals convey similar messages. One manual, for example, instructs that officers should "[e]stablish a friendly atmosphere, but never let the suspect develop any doubt about your competence and your complete control of the interrogation." Robert F. Royal & Steven R. Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 119 (1976) (emphasis omitted). The interrogator must "undermine [the accused's] confidence in escaping." *Id.* Another expert writes that "modern practices of in-custody interrogation are psychologically based and similar in some respects to brainwashing techniques." A. Daniel Yarmey, Understanding Police and Police Work: Psychosocial Issues 157 (1990).

& Criminology 266, 278 (1996). A common strategy was "to tell the suspect that they are here to discuss why, not whether, the suspect committed the crime." Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 Law & Society Rev. 259, 274 (1996). Further, the interrogators communicated implicit promises of leniency for cooperation by inviting the suspect to imagine how prosecutors or juries would perceive the case if no statement were made. *Id.* at 275-79.

Experimental psychologists have demonstrated the powerful impact of these techniques. Saul Kassin and Karlyn McNall tested subjects' reactions to interrogation transcripts. The subjects believed that suspects exposed to "maximization" techniques – tactics such as exaggerating the strength of the evidence and the seriousness of the offense – would receive harsher sentences than a control group of suspects who were not interrogated. Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233, 236-38 (1991). They also determined that minimization techniques – such as offering a suspect an excuse or moral justification for the crime – communicate implied expectations of leniency just as effectively as explicit promises of leniency. *Id.* at 236, 241. More recently, Kassin and Katherine Kiechel constructed an experiment in which subjects were falsely accused of accidentally deleting data as they quickly typed letters on a computer. When the experiment was conducted with a common interrogation tactic (a "witness" who claimed to have seen the subjects delete the data) every single one of the subjects signed a written confession admitting the false allegation, and 65%

internalized the false claim. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychology Sci. 125, 126-27 (1996).[11]

These studies validate the conclusion reached by this Court in *Miranda*: that custodial interrogations contain inherently compelling pressures, and that certain procedures are required to dispel them. While *Miranda*'s rules do not prevent all false or compelled confessions, they do act to discourage them. By giving suspects the choice whether to speak or remain silent, and by affording them an absolute ability to end a difficult interrogation simply by asserting Fifth Amendment rights, *Miranda* goes a long way towards dissipating the compelling pressures that are inherent in a custodial interrogation.

B. *Miranda*'s Procedures Are the Minimum Necessary to Counter the Compelling Pressures in a Custodial Interrogation and Thus Protect the Fifth Amendment Privilege

Miranda v. Arizona describes the minimum procedures necessary to protect the Fifth Amendment and

---

[11] *See also* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. L. Rev. 979, 985-1000 (1997) (reviewing actual interrogations and describing how suspects may be convinced to confess to crimes that they did not commit); Gisli H. Gudjonsson & James MacKeith, *Disputed Confessions and the Criminal Justice System*, Maudsley Discussion Paper No. 2, Instit. of Psychiatry, London (1997) (same); Gisli H. Gudjonsson, Michael D. Kopelman & James A. C. MacKeith, *Unreliable admissions to homicide: A case of misdiagnosis of amnesia and misuse of abreaction technique*, 174 British J. of Psychiatry 455 (1999) (describing an unreliable confession and how it was obtained).

the values embedded within it. This Court held that warnings and respect for the invocation of the Fifth Amendment privilege are required to combat the compelling pressures that are inherent in a custodial interrogation. *See* 384 U.S. 444, 467. Though a legislature might propose different safeguards to protect the Fifth Amendment privilege, this Court made clear that any proposed alternatives must be "at least as effective in apprising persons of their right of silence and in assuring a continuous opportunity to exercise it." 384 U.S. at 467.[12] But surely no other safeguards can be equally effective unless they ensure that a suspect is informed of his or her rights, and guarantee that officers will honor the unequivocal assertion of those rights. *Miranda's* procedures embody this constitutional minimum.[13]

---

[12] Professor Henry P. Monaghan has noted that *Miranda* "holds that 'adequate' safeguards are constitutionally required, and this puts a check on what Congress may do." Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 42 n. 216 (1975). His article provides an example of a statute that might permissibly replace the *Miranda* rule, a statute that would actually require the presence of counsel. *See id.* at 33. This law would, of course, afford suspects greater protection from compulsion than the *Miranda* rule itself. Further, Monaghan characterizes Congress' behavior in passing § 3501 as a "gesture of defiance" rather than as action taken as part of "a good faith dispute over the power of Congress to shape a rule protective of the fifth amendment using its own assessment of how subconstitutional policies should be compromised." *Id.* at 34, n. 176 (citation omitted). While Monaghan does call the *Miranda* rule "constitutional common law" (*id.* at 19-20), his work does not support the conclusion that a legislature has a free hand to overturn *Miranda*.

[13] Indeed, in commenting upon a draft of the *Miranda* opinion, Justice Brennan confessed that he could not "think of

Given that *Miranda* describes the minimum procedures necessary to preserve the Fifth Amendment privilege, 18 U.S.C. § 3501 may not be upheld. The statute contains no safeguards to lessen the compelling pressures that are applied during an interrogation. It does not in any way assure that suspects will be apprised of their rights or have the continuous opportunity to assert them. Without a warning of the right to remain silent, only the well-educated will understand that they are not required to speak. Without a warning of the right to appointed counsel, only the wealthy will know that they need not stand alone. Without an indication that officers are prepared to honor an invocation, only the most resolute will be able to make an unfettered choice whether to speak or remain silent in the station house. *Miranda* therefore requires – and this Court should reaffirm – that safeguards must exist to ensure that the Fifth Amendment privilege is available to all in our society.

C. *Miranda*'s Rule is Not Amenable to a Cost-Benefit Analysis

Because *Miranda*'s procedures are the minimum required to protect a suspect's Fifth Amendment rights,

---

other procedures that [would] serve the purpose." Weisselberg, *supra*, at 124-25 (citation omitted).

For further discussions of the "equally effective" language in *Miranda*, *see* Yale Kamisar, *The Warren Court and Criminal Justice*, *in* The Warren Court 116, 126 (B. Schwartz ed., 1996); Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 553-55 (1996); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 97 Sup. Ct. Rev. 99, 119 (1977); Weisselberg, *supra*, at 121-25.

they cannot be abrogated simply by applying a cost-benefit analysis, as some might suggest.[14] Moreover, *Amicus Curiae* wholly rejects the notion that *Miranda*'s impact can be viewed as a hurtful "cost." *Amicus Curiae* cannot accept that it is detrimental to our society for officers to tell suspects about their rights, and for suspects to assert them. *Miranda*'s requisite warnings are most important for the poor and ill-educated, people who do not know their rights. The claim that law enforcement officers should not be required to advise suspects of their rights implies that police should be able to take advantage of the poor and uneducated, and this claim is repugnant to our system of justice.

While *Amicus Curiae* rejects the application of a cost-benefit analysis to *Miranda*, it is also important to understand that *Miranda* is simply not amenable to such an approach. In the remainder of this brief, *Amicus Curiae* explains why applying a cost-benefit analysis to *Miranda* is itself a fruitless task.

1. The Purported "Costs" And "Benefits" Of *Miranda* Are Incommensurate

There is no single empirical method to establish the ordering of Fifth Amendment values and the "costs" of *Miranda*. These values and costs are incommensurate; they cannot be measured along the same scale. We may

---

[14] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. Rev. 839, 922 (1996) (arguing that *Miranda*'s rules "stem not from constitutional command, but rather from cost-benefit prophlaxis," which may be changed with a different assessment of costs and benefits.)

describe Fifth Amendment values, such as respect for individual autonomy and retention of the predominantly adversarial character of our system, but we cannot quantify them. Thus, even if it were possible to estimate the cases that *Miranda* renders "lost" or not subject to prosecution, there is no single metric that can capture *Miranda*'s "costs" and "benefits."

2. There Is No Reliable Measure of *Miranda*'s "Costs"

Even if it were possible to directly balance the "costs" and "benefits" of *Miranda*, there is as of yet no reliable measure of "costs." Professor Paul G. Cassell – *Miranda*'s most ardent critic today – has published a series of articles in which he asserts that *Miranda* has significantly damaged law enforcement efforts. As described below, Cassell's work has been heavily criticized by respected scholars. *Amicus Curiae* submits that neither his analyses of the empirical data, nor the data themselves, provide significant support for any revision to *Miranda*'s settled rules.

a. Pre- And Post-*Miranda* Confession Rates Do Not Provide A Reliable Measure Of "Costs"

Though Professor Cassell and his critics have devoted hundreds of pages in the law reviews to analyzing confession rate data, the studies all share one critical flaw: no jurisdiction accurately charted confession rates for any significant period of time before *Miranda* was decided. As detailed and meticulous as some of the

studies following *Miranda* may be, there are no reliable pre-*Miranda* data against which to measure them. For that reason alone, the studies provide an insufficient benchmark against which to assess whether *Miranda* had an immediate or long-term effect on confession rates. However, there are other problems with the studies that are worth addressing here.

Professor Cassell initially examined eleven studies of pre- and post-*Miranda* confession rates, all conducted shortly after *Miranda* was announced. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996). One must first question whether the pre- and post-*Miranda* studies are relevant today. The latest of the studies collected data only until 1968,[15] and they are therefore only relevant if one assumes that the police have not learned to adjust to *Miranda* in the decades since. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing With the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 407 (1999) ("Cassell's most glaring defect may be his failure to take into account the ways in which interrogators have adapted to the obstacles posed by *Miranda* over the past thirty-three years"); *see also* Schulhofer, Miranda*'s Practical Effect, supra*, at 507-10 (describing ways in which police have adapted to *Miranda*).[16] Of

---

[15] *See* Cassell, Miranda*'s Social Costs, supra*, at 405 ("Seaside City" Study).

[16] For example, one the studies Cassell cites, the Philadelphia study, illustrates the possibility of a rebound effect in confession rates. *See* Cassell, Miranda*'s Social Costs, supra*, at 402-05. Senator Arlen Specter participated in the study when he served as District Attorney (*id.*), and later admitted that,

course, so much else has changed in our criminal justice system that one must also question whether any inferences from the old studies should hold today. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 512-13. Nevertheless, even if the studies are somehow relevant, they are subject to such varying interpretations as to make them unreliable.

Based on the old studies, Professor Cassell concludes that the *Miranda* rule has resulted in an average decrease in the confession rate of approximately 16.1%, or one lost confession for every six criminal cases, leading to a loss of 3.8% of all prosecutions against suspects who are questioned. *See* Cassell, Miranda's *Social Costs*, *supra*, at 417, 437-38. Professor Stephen J. Schulhofer has carefully reviewed the pre- and post-*Miranda* studies and, to the extent that the studies are relevant at all, Schulhofer concludes that they show – at most – an average decrease in confession rates of 4.1%, with 0.78% of convictions lost due to *Miranda*. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 538-39.[17] Of course, such a decrease may mean only that *Miranda* has worked as intended: if the point of

---

"whatever the preliminary indications . . . I am now satisfied that law enforcement has become accustomed to *Miranda*." Yale Kamisar, Editorial, *Landmark Ruling's Had No Detrimental Effect*, Boston Globe, Feb. 1, 1987, A27 (quoting Sen. Specter).

[17] Several of the studied jurisdictions required some form of warnings prior to *Miranda*. Professor Schulhofer's figures of 4.1% and 0.78% are for comparisons to pre-*Miranda* regimes that included some warnings. His figures for lost confessions and convictions are 9.6% and 1.1%, respectively, for comparisons to pre-*Miranda* regimes with no warnings. *Id.*

Miranda is to provide safeguards against compelled confessions, then an immediate drop in the confession rate may mean that people who might have made statements due to compulsion now felt they had the option of remaining silent, as it was their right to do.

Cassell next produced a study of interrogations in Salt Lake County in 1994. *See* Cassell & Hayman, *supra*. Cassell and Hayman report that 9.5% of suspects invoked their rights and 33.3% confessed. *See id.* at 868-69. Comparing this confession rate to the pre-*Miranda* rate in the earlier studies from other parts of the United States, Cassell and Hayman conclude that *Miranda* is responsible for a fall in confession rates in Salt Lake County from approximately 55-60% to 33%. *See id.* at 871-76. This study was critiqued by Professor George Thomas, who examined Cassell and Hayman's data and determined that a more accurate custodial confession rate in Salt Lake County was 54%. *See* George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. Rev. 933, 951-52 (1996).

The data in the eleven pre- and post-*Miranda* studies, along with Cassell's own Utah study, were not collected according to a common methodology, and are thus subject to varied interpretations. That Professors Cassell, Thomas and Schulhofer interpret the same data differently highlights the difficulty in arguing that these data should support any modification to *Miranda*'s settled rule. Some examples from these studies make this point clear.

One older study that presents particular problems is James Witt's examination of police practices in "Seaside

City." *See* James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. Crim. L. & Criminology 320 (1973). Witt found only a small drop in the confession rate after *Miranda*, from 68.9% to 66.9%. *See* Cassell, Miranda's *Social Costs*, *supra*, at 405. Professor Cassell finds this 2% decline overly conservative because Witt examined only cases in which suspects were actually arrested and incarcerated by the police, and because "Seaside City" police gave limited *Miranda*-like warnings before the case was decided and did not describe how "Seaside City" police implemented *Miranda*. *See id*. Professor Schulhofer, on the other hand, takes the "Seaside City" study as an ideal opportunity to assess the difference between a partial *Miranda* regime and one in which full warnings are implemented. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 529. Further, in examining the raw data, Schulhofer determines that the pre-*Miranda* confession rate was actually 71%, and the post-*Miranda* rate was 73% – an *increase* of 2% (*id*.) – an indication that there is no observable change in confession rates post-*Miranda*. *Id*. at 529-30.

There are similar problems in Professor Cassell's decision to omit certain studies from his article. For example, Cassell excludes a Los Angeles study because of concerns about the sampling technique, which led him to believe that the result of the study (which showed a 10% *increase* in confessions post-*Miranda*) could not possibly be correct. *See* Cassell, Miranda's *Social Costs*, *supra*, at 415-16. Professor Schulhofer, on the other hand, views the Los Angeles study as another example of the distinction between Cassell's proposed regime and *Miranda*'s rule,

similar to the "Seaside" study, and discounts Cassell's sampling concerns. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 534-37. Including this study would have altered Cassell's final figures.

There is also dispute about interpretation of Professor Cassell's own 1994 Salt Lake County data. Cassell reports a 33.3% confession rate in Salt Lake County, but that includes defendants who were never questioned; of the defendants who were actually questioned by police, 42.2% confessed. *See* Cassell & Hayman, *supra*, at 868-69. Professor George Thomas found that even the 42.2% rate was artificially depressed by two flaws in the interpretation of the data, Cassell's inclusion of non-custodial questioning and an overly restrictive treatment of partially-incriminating statements. *See* Thomas, *supra*, at 946-50. Adjusting for these flaws, Thomas found the custodial confession rate to be 54%, "remarkably like" the rate that Cassell claims existed prior to *Miranda*. *Id*. at 951-53; *see also* Schulhofer, Miranda's *Practical Effect*, *supra*, at 509, n. 28.

That all of these studies have been interpreted to support different results means that we can have little confidence in obtaining an accurate comparison of pre- and post-*Miranda* confession rates. *Amicus Curiae* entirely rejects the application of a cost-benefit analysis to *Miranda*. But even if we might wish to apply such an analysis, we do not have reliable data showing a drop in confession rates after *Miranda*.

b. Clearance Rates Do Not Provide A Reliable Measure of "Costs"

Professor Cassell has also attempted to link a decline in some crime clearance rates to *Miranda*. He initially published a simple chart, purporting to show a decrease in violent crime clearance rates in the wake of *Miranda*. *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 Nw. U. L. Rev. 1084, 1089-91 (1996).[18] After the chart was critiqued,[19] Cassell created a regression model and has claimed that the aggregate clearance rates for violent and property crimes would be 6.7% higher without *Miranda*. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055, 1082 (1998). Law professor and economist John Donohue has analyzed this study carefully, and has expressed serious reservations about the data and the model. *See* John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147, 1151-62 (1998). After much effort, Donohue is left with "an unbridgeable uncertainty about how much confidence to repose in any of the statistical results." *Id.* at 1172.

The clearance rate data are plagued by serious problems. Though Cassell argues that because clearance rates have been collected by the FBI since the 1950s, they are

---

[18] *See also* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 Ariz. St. L. J. 299, 307 (1996).

[19] *See generally* Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 Nw. U. L. Rev. 278 (1996).

the best available way to obtain a broad perspective on *Miranda's* effects (*see* Cassell & Fowles, *supra*, at 1063), Donohue raises real concerns about whether the FBI clearance rates are accurate measures. *See* Donohue, *supra*, at 1152. There are a number of factors that affect the reporting of crime data, including political manipulation (*id.* at 1152-53), more accurate reporting of crime (*id.*), and changes in the pool of cities that have reported data over time (*id.* at 1167).

Moreover, a drop in crime clearance data over time may only be attributed to *Miranda* if one successfully controls for other forces for change in our legal system and society. Other factors affecting the analysis might include: increasing crime rates (*see, e.g.*, Schulhofer, Miranda *and Clearance Rates*, *supra*, at 281-83); declining police resources (*see id.* at 288); increasing professionalism in police departments (*see, e.g.*, Schulhofer, Miranda's *Practical Effect*, *supra*, at 511-12); decreasing tolerance of courts to confessions that appear to be compelled in violation of the Fourteenth Amendment (*see id.*); the implementation of *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Mapp v. Ohio*, 367 U.S. 643 (1961) (*see id.* at 512-13); and increasing drug use (*see* Donahue, *supra*, at 1159), among others. As Professor Donohue notes, "Neither Cassell and Fowles, nor any other researchers, have found a way to control for these influences in regression models, so the Cassell-Fowles article implicitly attributes all of these effects to *Miranda*." *See id.*

Finally, because of the difficulties with the clearance rate data and Cassell's model, Donohue suggests limiting the regression analysis to murder because murder is the most accurately-reported crime. *Id.* at 1153. Critically,

Cassell has found no statistically significant effect of *Miranda* on homicide clearance rates. *See* Cassell & Fowles, *supra*, at 1086, tbl. II.

Again, *Amicus Curiae* rejects the application of a cost-benefit analysis to *Miranda*. Even so, as with the pre- and post-*Miranda* studies, clearance rates simply do not provide a reliable measure of *Miranda*'s "costs."

3. There Is No Reliable Measure of the "Costs" of Section 3501 or Alternative Regimes

Just as we have no means for reliably measuring *Miranda*'s "costs," we have no method to assess the costs of implementing either 18 U.S.C. § 3501 or any other alternative regime.

Section 3501 purports to make two fundamental changes in the federal criminal justice system. First, it obliterates the "bright line rules" that have guided federal law enforcement officers, courts and lawyers for 33 years. Second, it returns us to the days before *Miranda* by replacing a prescriptive approach with a statute that seeks only to ameliorate harm that has already occurred.

Without any sure compass, officers will more frequently engage in tactics that force statements from unwilling suspects, particularly those who are poor and ill-educated. This Court has repeatedly emphasized the importance of affording clear guidance to police. *See, e.g., Davis v. United States*, 512 U.S. 452, 461 (1994) (emphasizing the importance of a bright line rule "that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of

information").[20] There is no reason to believe that officers will have any more success determining the permissible limits of interrogation under § 3501 than they had in gleaning clear rules from this Court's voluntariness jurisprudence prior to *Miranda*.[21] *Amicus Curiae* fears that the "costs" of § 3501 will be primarily borne by the poor and poorly-educated, people who do not understand and will not be told that they have a right to remain silent during a custodial interrogation. Compelled statements exact a heavy price from suspects, the innocent and the guilty alike (*see Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992)), and we will see many more such statements.

Section 3501 also fails to give courts, prosecutors, or defense counsel any specific means to determine whether

---

[20] *See also Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (praising interrogation decisions that provide clarity and certainty); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) (stressing the value of " 'clear and unequivocal' guidelines"); *Burbine*, 475 U.S. at 425 (" '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application.") (internal citation omitted); *New York v. Quarles*, 467 U.S. 649, 658 (1984) (recognizing "the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' ") (internal citation omitted).

[21] Indeed, this Court's pre-*Miranda* decisions "yield no talismanic definition of voluntariness mechanically applicable to the host of situations where the question has arisen. 'The notion of voluntariness, Mr. Justice Frankfurter once wrote, 'is itself an amphibian.' " *Bustamonte*, 412 U.S. at 224 (internal citations omitted).

a confession was in fact compelled. Section 3501(b) provides that the judge should consider "all of the circumstances surrounding the giving of the confession," and then enumerates several non-determinative factors. The statute gives no indication of the weight to be given to these factors, nor does it provide any limitation as to other evidence that may bear on the voluntariness determination. The statute will be subject to many conflicting interpretations and, in the end, it is unlikely that any clear rule will emerge.

Law enforcement will also suffer under § 3501. Erasing *Miranda's* bright-line rule will cause uncertainty in the field, jeopardizing prosecutions. As this Court noted in *Michigan v. Tucker*, *Miranda*'s rules were designed "to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost." 417 U.S. 433, 443 (1974). Without sure rules, officers will err more often, leading to diminished conviction rates.

Finally, while *Miranda* permits the states to enact other procedures that are "at least as effective" in protecting the Fifth Amendment privilege (384 U.S. at 467), a decision upholding § 3501 would invite experimentation without a constitutional floor. We do not know what form the states' experiments will take, nor may we gauge the effectiveness of their legislative actions.[22] But we do

[22] Professor Cassell, for example, argues that videotaping interrogations "would certainly be as effective as *Miranda* in preventing police coercion and probably more so." Cassell, Miranda's *Social Costs*, *supra*, at 487. While videotaping may resolve many factual disputes about the circumstances of an interrogation, it does not directly require police to take any steps to lessen the coercive atmosphere in the station house. Moreover, as a recent and disturbing study has made clear, there will always be interactions between the officers and the suspect that are not caught on videotape (*see* Mike McConville, *Videotaping Interrogations: police behaviour on and off camera*, [1992] Crim. L. R. 532), leaving open the possibility that constitutionally-impermissible compulsion will continue even under a system that requires taping.

know that state and federal courts will be embroiled in litigation for years to come, assessing voluntariness on a case-by-case basis as well as determining whether any proposed legislative alternatives comport with the Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

MICHELLE FALKOFF
KATE J. STOIA
BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market
San Francisco, California 94105
(415) 442-0900

CHARLES D. WEISSELBERG
Center for Clinical Education
University of California
School of Law (Boalt Hall)
Berkeley, California 94720-7200
(510) 643-8159
(*Counsel of Record*)

Attorneys for *Amicus Curiae*
The National Legal Aid and Defender Association

STATUTORY APPENDIX

18 U.S.C.S § 3501 (1999)

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate [magistrate judge] or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Jan 28 2000

(16)

Supreme Court, U.S.
FILED
JAN 28 2000
CLERK

No. 99-5525

In The
SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
Fourth Circuit Court of Appeals

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

John W. Whitehead
Maria E. Selig
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia
22906
(804) 978-3888

James Joseph Lynch, Jr.
(Counsel of Record)
2740 Howe Avenue
Sacramento, California
95821
(916) 448-7871

January 28, 2000

2400

QUESTION PRESENTED FOR REVIEW

1. Whether the passage of 18 U.S.C. § 3501 was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966)?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....ii

TABLE OF AUTHORITIES.....iv

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. CONGRESS HAS BEEN GIVEN THE POWER "TO ENFORCE," NOT THE POWER "TO DETERMINE" WHAT CONSTITUTES A CONSTITUTIONAL VIOLATION.....4

II. *MIRANDA* SERVES AS A TIME-TESTED, VENERABLE AND IMPORTANT PROPHYLACTIC PROTECTING AN ACCUSED'S 5TH AMENDMENT RIGHT TO REMAIN SILENT AND 6TH AMENDMENT RIGHT TO PUBLIC TRIAL.....9

CONCLUSION.....16

TABLE OF AUTHORITIES

Case

Aguilar v. Texas, 378 U.S. 108 (1964) 11

Arkansas Educational Television Comm'n. v. Forbes, 523 U.S. 666 (1998) 1

Bivens v. Six Unknown Agents of the FBI, 403 U.S. 388 (1971) 5, 14

Boerne v. P.F. Flores, 521 U.S. 511 (1997) ... 3, 4, 6, 8, 9

Bolling v. Sharpe, 347 U.S. 497 (1954). 5

Boyd v. United States, 116 U.S. 616 (1886) 12

Brown v. Mississippi, 297 U.S. 278 (1936) 13

Butz v. Economou, 438 U.S. 478 (1975). 5

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 8

City of Rome v. United States, 446 U.S. 156 (1980) 7

Davidson v. New Orleans, 96 U.S. 97 (1878) 10

Duncan v. Louisiana, 391 U.S. 145 (1968) 10

Escobedo v. Illinois, 378 U.S. 478 (1964) 12

Ex parte Virginia, 100 U.S. 339 (1880) 6

Ferguson v. Georgia, 365 U.S. 570 (1961) 10

Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 7

Franks v. Delaware, 438 U.S. 154 (1978) 14

Frazee v. Dept. of Employment Sec., 489 U.S. 829 (1989) 1

Harris v. New York, 401 U.S. 222 (1971) 13

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983) .. 11

Illinois v. Wardlow, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000) 1

In re Oliver, 333 U.S. 257 (1948) 13

James Everard's Breweries v. *Day*, 265 U.S. 545 (1924) 7

James v. Illinois, 493 U.S. 307 (1990) 13

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 6, 7, 15

Lassiter v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959) 7

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 4, 9, 15

McCulloch v. *Maryland*, 4 Wheat. 316 (1819) 4

Michigan v. Harvey, 494 U.S. 344 (1990) 12

Michigan v. Jackson, 475 U.S. 625 (1986) 12

Mincey v. Arizona, 437 U.S. 385 (1978) 13

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Murrays' Lessee v. Hoboken Land & Improvement, 59 U.S. (18 How.) 272 (1856) 10

Opper v. United States, 348 U.S. 84 (1954) 11

Oregon v. *Mitchell*, 400 U.S. 112 (1970) 7, 8

People v. Terry, 99 Cal.App.2d 579 (1950) 13

Screws v. United States, 325 U.S. 91 (1945) 14

Slack v. McDaniel, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998) 1

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) ... 7, 8

Spinelli v. United States, 394 U.S. 410 (1969) 11

United States v. Cianfrani, 573 F.2d 835 (3d.1978) 13

United States v. Felix-Jerez, 667 F.2d 1297 (9th Cir.1982) 12

United States v. Henry, 447 U.S. 264 (1980) 13

United States v. Price, 383 U.S. 787 (1966) 14

Walder v. United States, 347 U.S. 64 (1954) 12

Warden v. Hayden, 387 U.S. 294 (1967) 12

Wayman v. Southhard, 23 U.S. (10 Wheat.) 1 (1825) ... 6, ... 8, 9

Wong Sun v. United States, 371 U.S. 471 (1963) 11, 12

Wyoming v. Houghton, 526 U.S. 295 (1999) 1

Constitutions and Statutes

United States Const., Art. I, § 8, clause 9 5

United States Const., Art. I, § 8, clause 18 ..... 5, 6

United States Const., Art. III, § 1 5

United States Const., Art. III, § 2, cl. 2 5

United States Const., 5th Amendment ..... passim

United States Const., 6th Amendment ..... passim

United States Const., 14th Amendment, § 5 ..... passim

United States Const., 15th Amendment, § 2 7

United States Const., 18th Amendment 7

Magna Carta of 1215 ..... 3, 10

18 U.S.C. § 3501 ..... passim

Miscellaneous

1 Stephen, History of the Criminal Law of England 10

10 Halsbury's Statutes of England (4th ed.) (Vol. 10), Constitutional Law, 25 Edw. 1 (*Magna Carta*)(1297), Notes ¶3 11

Barrett, et al; *Constitutional Law, Cases and Materials* (University Casebook Series, 4th ed., 1973) 10

McKechnie, *MAGNA CARTA*; A COMMENTARY ON THE GREAT CHARTER OF KING JOHN. 11

Rotunda, Treatise on Constitutional Law 10

Saltzburg, Stephen A. & Daniel J. Capra, *American Criminal Procedure* (5th ed. 1996) 4

Schwartz, *The Bill of Rights; A Documentary History* (1971) 10

The Federalist, No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison) 4

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases; *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases namely, *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998), and *Illinois v. Wardlow*, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous fourth Amendment cases. The Institute has published

---

1 *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Copies of letters of consent from the parties' counsel are on file with the Clerk of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

educational materials and taught continuing legal education classes in this area as well.

In this particular case, the status of the Miranda Doctrine is a deeply ingrained criminal defense tool. It ought not to be discarded, if at all, without at least a full scrutiny of its origins, the purpose it serves, and the relationship between this Court, the Congress, and the limitations placed on Congressional power both in the Bill of Rights and Section 5 of the 14th Amendment. With its depth and breadth of knowledge on this subject, The Rutherford Institute believes that the accompanying brief addresses areas related to the issues raised which this Court should consider in reaching its decision.

SUMMARY OF ARGUMENT

Congress enacted 18 U.S.C. § 3501 in direct response to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. However, under our Constitution, the Federal Government is one of the enumerated powers. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Congress' power under §5 of the 14th Amendment, however, extends only to "enforc[ing]" the provisions of the Bill of Rights. This Court has described this power as "remedial." The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Bill of Right's restrictions. Legislation, which alters the meaning of the Bill of Rights, cannot be said to be enforcing it. Congress does not enforce a constitutional right by changing what the right is. It has been

given the power "to enforce," not the power to determine what constitutes a constitutional violation. Here, Congress has attempted to redefine the rights of an accused under the 5th Amendment and 6th Amendment. This is neither remedial nor is it enforcement of a right, but rather, it is a determination of the rights of the accused. This determination is the exclusive domain of this Court. *E.g., Boerne v. P.F. Flores*, 521 U.S. 511 (1997).

The Miranda Doctrine is an imbedded criminal defense doctrine whose roots are found in the *Magna Carta* of 1215. This Court has stricken statements of the accused, long before *Miranda*, on a mere showing that there was no corroborating evidence that the defendant gave the statement. *Miranda* serves as a prophylactic reminder to the accused that he has rights, but also to the officers involved that there are limitations on what may be done with, or to, the accused. Moreover, this prophylactic serves to protect the important 6th Amendment right to public trial in that it assures the public that the accused is treated fairly at a trial, if that is the accused's choice, and not condemned in a "star chamber" proceeding. The rationale of this Court always has been, and always should be, "better to allow a guilty person go free rather than risk convicting an innocent person on tainted evidence."

For the foregoing reasons, the court should reverse the 4th Circuit on its ruling that "Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting 18 U.S.C. § 3501, and hence, rather than *Miranda* governs the admissibility of confessions in federal court." Opinion at 166 F.3d 667.

ARGUMENT

I. CONGRESS HAS BEEN GIVEN THE POWER "TO ENFORCE," NOT THE POWER "TO DETERMINE" WHAT CONSTITUTES A CONSTITUTIONAL VIOLATION

Congress enacted 18 U.S.C., § 3501 in direct response to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Opinion below, 166 F.3d at 667, 685-86 (1999), *citing* Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 545 (5th ed. 1996). Assuming, *arguendo*, that was Congress' intent, Congress crossed the line and did that which it may not do. *E.g., Boerne v. P.F. Flores*, 521 U.S. 511 (1997).

Under our Constitution, the Federal Government is one of enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819); see also The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). *E.g., Boerne v. P.F. Flores*, 521 U.S. 511, 515 (1997).[2]

Whether the Congress relied on its powers under the "necessary and proper" clause or on the 14th Amendment in passing § 3501 is not at all clear. Opinion below, 116 F.3d 667,

[2] The scope of protection afforded by the Bill of Rights is the same, whether asserted against state officials or federal officials.

687-88. The Fourteenth Amendment provides,[3] in relevant part:

> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties disagree over whether § 3501 is a proper exercise of Congress' power to legislate. There are two sources which, arguably, support Congressional authority, to wit § 5 of the 14th Amendment "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws." The other would be Art. I, § 8, clause 18, the so-called "necessary and proper" clause.[4] The court of appeals did not even address this

[3] While the 14th Amendment appears to be directed at the several states, it does not negate the right of Congress to enforce the Bill of Rights as against the federal government. *E.g., Bivens v. Six Unknown Agents of the FBI, 403 U.S. 388 (1971); Butz v. Economou*, 438 U.S. 478 (1975) (abolishing distinctions in liability for federal government employees acting under color of law and state employees acting under color of law); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (recognizing an "equal protection" element to the "due process" clause of the 5th Amendment).

[4] Art. I, § 8, clause 9 grants Congress the power "to constitute tribunals inferior to the Supreme Court". Clause 18 grants authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. III, § 1 provides, "The judicial Power of the United States, shall be vested in one supreme Court, and **in such inferior Courts as the Congress may from time to time ordain and establish**." (Emphasis added.) Art. III, § 2 clause 2 states, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before

issue, finding only that Congress had the power, without specifying where in the Constitution the power is created. Opinion below, 166 F.3d, at 687-88. The court of appeals looked only to see if the rule were constitutionally required. *Id.* At this juncture, for the sake of clarity and continuity, the Court's *amicus* will assume that the rule is constitutionally required for the sake of discussing whether, if so, Congress can overrule *Miranda*. In a subsequent section, the Court's *amicus* will discuss *Miranda* and whether it is constitutionally mandated.

All must acknowledge that both Art. I, § 8, clause 18 and §5 of the 14th Amendment are "a positive grant of legislative power" to Congress, *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *Wayman v. Southhard*, 23 U.S. (10 Wheat.) 1 (1825). In *Ex parte Virginia*, 100 U.S. 339 (1880) and *Boerne v. P.F. Flores*, 521 U.S. at 517, this court explained the scope of Congress' §5 power in the following broad terms:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against ... denial or invasion, if not prohibited, is brought within the domain of congressional power."

100 U.S. at 345-46.

---

mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, **with such Exceptions, and under such Regulations as the Congress shall make."** (Emphasis added.)

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if, in the process, it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U.S. Const., Amend. 15, §2, as a measure to combat racial discrimination in voting, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966), despite the facial constitutionality of the tests under *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959). This court has also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina* v. *Katzenbach*, *Op.Cit.* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach* v. *Morgan*, *Op.Cit.* (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States*, 446 U.S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a " 'standard, practice, or procedure with respect to voting' "); *see also James Everard's Breweries* v. *Day*, 265 U.S. 545 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

It is also true, however, that "[a]s broad as the

congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell*, 400 U.S. at 128 (opinion of Black, J.); *Boerne v. P.F. Flores*, 521 U.S. at 518 (Opinion by Kennedy, J.). In assessing the breadth of §5's enforcement power,[5] we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with Respondent, of course, that Congress can enact provisions under §5, enforcing the constitutional rights of persons before the court, including the accused. The "provisions of this article," to which §5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the various provisions of the Bill of Rights and control the judicial business follows from this Courts' holding in *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), *Boerne v. P.F. Flores*, 521 U.S. at 518-19, and *Wayman v. Southhard*, 23 U.S. (10 Eat.) 1 (1825).

Congress' power under §5, however, extends only to "enforc[ing]" the provisions of the Bill of Rights. The Court has described this power as "remedial,"*Katzenbach*, 383 U.S. at 326. The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Bill of Rights' restriction. Legislation which alters the meaning of any provision of the Bill of Rights cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what is or is not a constitutional violation. Were it not so, what Congress would be enforcing would no longer be,

[5] It would appear that if § 3501 can pass § 5 scrutiny, it can also pass the "necessary and proper" clause scrutiny as well. On the other hand, if Congress has transgressed the 5th and 6th Amendments, then the law is not "necessary and proper," therefore failing that test as well.

in any meaningful sense, the "provisions of [the Bill of Rights.]" *See Boerne v. P.F. Flores*, 521 U.S. at 519, and *Wayman v. Southhard*, *supra*.

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment. *E.g., Boerne v. P.F. Flores*, 521 U.S. at 519-20, and *Wayman v. Southhard*, *supra*.

If Congress could define its own powers by altering the Bill of Right's meaning, the Constitution would no longer be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V. *See generally, Boerne v. P.F. Flores*, 521 U.S. at 529.

We now consider whether § 3501 can be considered enforcement legislation under §5 of the Fourteenth Amendment.

II. *MIRANDA* SERVES AS A TIME-TESTED, VENERABLE AND IMPORTANT PROPHYLACTIC PROTECTING AN ACCUSED'S 5TH AMENDMENT

RIGHT TO REMAIN SILENT AND 6TH AMENDMENT RIGHT TO PUBLIC TRIAL

The *Magna Carta* has always been regarded as the antecedent of our own Bill of Rights and looked to for meaning regarding the Bill of Rights and its intended protections. *See generally*, Schwartz, *The Bill of Rights; A Documentary History* (1971); 1 Rotunda, *Treatise on Constitutional Law* (Vol. 1) § 3.1, note 4; *id.* at § 20.53; Barrett, et al, *Constitutional Law, Cases and Materials* (University Casebook Series, 4th ed., 1973), p. 591; *Murrays' Lessee v. Hoboken Land & Improvement*, 59 U.S. (18 How.) 272 (1856); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Davidson v. New Orleans*, 96 U.S. 97 (1878).

The *Miranda Doctrine* is an imbedded criminal defense doctrine whose roots are found in the *Magna Carta* of 1215. At common law, "No bailiff for the future shall, upon his own unsupported complaint, put anyone to his 'law,' without credible witnesses brought for this purpose."[6] *Magna Carta*,

[6] At common law it was also true that the accused was required to conduct his own defense since he was neither allowed to call witnesses in his behalf nor permitted the assistance of counsel. *See generally*, *Ferguson v. Georgia*, 365 U.S. 570, 573-74 (1961); 1 Stephen, *History of the Criminal Law of England*, p. 350. In the 17th Century, the accused could call witnesses by statute, but could not testify. The general rationale was the defendant was an interested party and therefore disqualified. *Ibid.* This disqualification carried over to this country at its founding. Maine was the first state, in 1859, to discard the common law and allow interested parties to testify under oath in civil cases. The chief argument against the practice in criminal courts was perceived as how to protect the defendant's right to remain silent. Eventually, by 1961, the sole state left which disqualified criminal defendants from testifying was Georgia. *Ferguson, Op. Cit.* at 575-77.

Article 38; McKechnie,[7] *MAGNA CARTA*; A COMMENTARY ON THE GREAT CHARTER OF KING JOHN. In American jurisprudence, corroboration by extrinsic evidence has been the rule, rather than the exception. *Cf. Spinelli v. United States*, 394 U.S. 410 (1969) (corroboration existed); *Illinois v. Gates*, 462 U.S. 213 (1983) (extrinsic evidence based upon totality of circumstances)[8] with *Aguilar v. Texas*, 378 U.S. 108 (1964) (corroboration lacking); *Wong Sun v. United States*, 371 U.S. 471, 488-489 (1963) (extrinsic corroboration lacking); also, *Opper v. United States*, 348 U.S. 84 (1954). In the past and currently, the requirement for extrinsic corroboration was designed for the protection of persons from the abuses of government. McKechnie, The *Magna Carta*, pp. 370-377; 3 Rotunda (Vol.3) § 23.20.[9] In following *Wong Sun, supra*,

[7] McKechnie is the recognized scholar on the original *Magna Carta*. 10 Halsbury's Statutes of England (4th ed.) (Vol. 10), Constitutional Law, 25 Edw. 1 (*Magna Carta*)(1297), Notes ¶ 3.

[8] *Gates* did not overrule *Spinelli* or *Aguilar* as to extrinsic corroboration; rather it shifts the focus to demand the magistrate look to the totality of circumstances known to the officers to determine whether or not probable cause existed. In fact, the shift was not even required. On the facts of *Gates*, the officers themselves had corroborated what the informer said; and of course the informer was the extrinsic corroboration of the officers conduct, so there was cross corroboration. Looking to the totality of circumstances in that case, the officers had at least sufficient information for a detention. But they had insufficient information for a full-blown search because of the vagueness of the vehicle description, a total absence of a description of the suspects, and nothing in plain view. *Compare n.* 10 below.

[9] "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can be obviated by

which had itself struck Defendant's statement for lack of extrinsic corroboration, federal courts have consistently followed the rule. *E.g., United States v. Felix-Jerez*, 667 F.2d 1297, 1299-1300 (9th Cir. 1982).

Aside from the voluntariness of a confession, the courts have always held that criminal confessions and admissions of guilt require extrinsic corroboration. *Wong Sun v. United States,* 371 U.S. at 488-489; *United States v. Felix-Jerez,* 667 F.2d at 1299-1300. Against this backdrop, this Court adopted two theories for dealing with confessions. *See Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966). A confession may not be used in the prosecution's case in chief where the confession was taken without giving the defendant notice of his rights because, without such notice, involuntariness was presumed. *Miranda v. Arizona,* 384 U.S. 436 (statement taken in violation of 5th Amendment right to remain silent); *Michigan v. Jackson*, 475 U.S. 625 (1986)(statement taken in violation of 6th Amendment right to counsel). However, statements taken in violation of *Miranda* may be used for impeachment purposes. *Walder v. United States,* 347 U.S. 64 (1954) (violation of 5th Amendment); *Michigan v. Harvey,* 494 U.S. 344 (1990) (violation of 6th Amendment). Such evidence may also be admitted if reliable and probative evidence would further the truth-seeking function and if the likelihood that admission of such illegally obtained

---

adhering to the rule that constitutional provisions for security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance." *Boyd v. United States,* 116 U.S. 616, 635 (1886)(Harlan, J.), overruled on other grounds. *See Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit & exigent circumstance exception; mere evidence rule).

evidence would encourage police misconduct is only a "speculative possibility." *Harris v. New York*, 401 U.S. 222, 225 (1971).[10] Prosecutors may use such statements to impeach answers elicited on cross-examination of matters clearly within the scope of direct examination. *Harris, supra.* However, illegally obtained statements from the defendant may not be used to impeach other defense witnesses. *James v. Illinois,* 493 U.S. 307 (1990). An involuntary statement cannot be admitted for any purpose. *Mincey v. Arizona,* 437 U.S. 385, 397-98 (1978); *Brown v. Mississippi*, 297 U.S. 278 (1936). Thus, *Miranda* itself has never been an absolute bar, but only a bar for use in the prosecutor's case in chief.

While the Fifth Amendment guarantees the accused the right to remain silent, *Miranda v. Arizona, supra*, and the Sixth Amendment guarantees the accused the right to a public trial, *United States v. Henry,* 447 U.S. 264 (1980); *United States v. Cianfrani,* 573 F.2d 835 (3d. Cir. Pa. 1978), their function is to operate as an effective restraint on possible abuses of the judicial system. *Id.* at 847. The requirement is recognized as "for the benefit of the accused, that public may see that accused is fairly dealt with and not unjustly condemned, and that presence of interested spectators" (e.g. counsel) "may keep his triers keenly alive to sense of their responsibilities and to the importance of their functions." *People v. Terry,* 99 Cal.App.2d 579, 584, 222 P.2d 95, 99 (1950); *In re Oliver,* 333 U.S. 257

---

[10] It is here suggested that the approach suggested in *Harris v. New York* should be followed: *i.e.*, where the officers acted in good faith in violation of *Miranda*, or where they ignored *Miranda* to deprive the accused of the chance to testify, such evidence should not be admissible for impeachment purposes if (1) there is bad faith, (2) the evidence is of questionable probative value, and (3) there is no extrinsic corroboration: (a) that the defendant in fact made the statement; or (b) of the contents.

(1948); *Screws v. United States,* 325 U.S. 91 (1945); (pre-trial detainee beaten to death); *United States v. Price,* 383 U.S. 787 (1966) (certified judgments indicated that deputy sheriff was subsequently convicted of murdering the pre-trial detainees/civil rights workers); *Franks v. Delaware,* 438 U.S. 154 (1978); are but a few of legions of examples of what may transpire outside the presence of counsel. These cases point out the difficulty inherent in proving improper conduct hidden away from public scrutiny or the watchful eyes of diligent counsel, and witness the need to erect barriers to prevent abuse of pre-trial detainees. What have we gained if we have abolished the "star chamber" in a building, only to erect it on our highways and byways, away from any scrutiny whatsoever? Nothing. We have lost the essence of liberty that a person make a knowing, intelligent, and voluntary choice. The Court should adopt the reasoning in *Bivens v. Six Unknown Agents of the FBI,* 403 U.S. 388 (1971) that there must be an effective deterrent to police abuse by arresting and interrogating officers, and that the best deterrence is the reading of *Miranda* rights as a constant reminder to peace officers of their responsibility to uphold the law, but not to abuse it.

Moreover, this prophylactic serves to protect an important 6th Amendment right to public trial in that it assures the public that the accused is treated fairly at a trial, if that is the accused's choice, and not condemned in a "star chamber" proceeding. The rationale of this court has always been, and should always be, that is it is better to allow a guilty person to go free rather than chance convicting an innocent person on tainted evidence.

It is clear that, under the 5th Amendment, an accused cannot be compelled to testify against himself. The amendment is silent as to the issue of voluntariness. It is also clear that, from time immemorial, the bailiff (*i.e.* peace officers) could not, without corroboration, present evidence against the defendant

by putting words into the defendant's mouth. In order to prevent the "star chamber" from becoming our courts, thereby destroying the effectiveness of the adversary system, the *Miranda* warning is a constitutionally compelled and necessary process that strikes the appropriate balance by preventing use of alleged statements by an accused, unless the defendant willingly, in public, waives his right to remain silent in order to take the stand. Therefore, Congress overstepped its powers.

Our national experience teaches that the Constitution is best preserved when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). When the political branches of the government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that, in later cases and controversies, the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. § 3501 was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not § 3501, which must control.

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Bill of Rights," and its conclusions are entitled to much deference. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, *supra*. to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the

Enforcement Clause of the Fourteenth Amendment, § 3501 contradicts vital principles necessary for the preservation of an accused's 5th Amendment rights. These rights include the right not to be compelled to be a witness against himself, and the assurance of the public generally that the accused is treated fairly in a public trial rather than subjected to an inquisition, and the maintenance of the separation of powers and the federal system of checks and balances.

CONCLUSION

For the foregoing reasons, the court should reverse the 4th Circuit on its ruling that "Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting 18 U.S.C. § 3501," and hold, rather, that *Miranda* governs the admissibility of confessions in federal court.

Respectfully submitted,

John W. Whitehead
Maria E. Selig
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia
22906
(804) 978-3888

James Joseph Lynch, Jr.
(Counsel of Record)
2740 Howe Avenue
Sacramento, California
95821
(916) 448-7871

Jan 23 2000

(17)

Supreme Court, U.S.
FILED
[redacted] 2000
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

October Term, 1999

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE HOUSE DEMOCRATIC LEADERSHIP IN SUPPORT OF PETITIONER

Charles Tiefer
(*Counsel of Record*)
Associate Professor
University of Baltimore School of Law
1420 North Charles Street
Baltimore, MD 21201
(301) 951-4239

Jonathan W. Cuneo
The Cuneo Law Group
317 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 789-3960

Counsel for *Amicus Curiae*
House Democratic Leadership

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9829

31pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 4

I. *Miranda's* Constitutional Basis, and This Court's Decades of Reaffirming *Miranda*, Prevent Congress From Simply Superseding It By a Provision Such As Section 3501 5

II. Congress Provided Little or No Basis in Section 3501 For a Challenge to *Miranda*. 8

A. As the Context of the 1968 Enactment Shows, Congress Had Little Basis for Challenging *Miranda* By a Statute, Such as Section 3501, Applicable Only in Federal Cases 9

B. The Process of Passage, and the Final Form of Title II, Show Congress Not Expecting a Section 3501 Challenge to *Miranda* Absent a Change in Executive Branch Opposition to Doing So. 11

C. The History of Section 3501 Confirms Congress' Expectation That Section 3501 Would Serve Largely Symbolic Purposes Rather Than Producing a Serious Challenge to *Miranda*. 19

III. If Section 3501 is Applied in this Case to Require This Court to Deem *Miranda* Superseded, The Provision Is Unconstitutional As So Applied. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: **Page(s)**

American Foreign Service Association v. Garfinkel, 490 U.S. 153 (1989).....2, 24

Berger v. New York, 388 U.S. 41 (1967).....15

Bowsher v. Synar, 478 U.S. 714 (1986).....2

Burke v. Barnes, 479 U.S. 361 (1987).....2

City of Boerne v. Flores, 521 U.S. 507 (1997).....24

Davis v. United States, 512 U.S. 452 (1994).....8

Escobedo v. Illinois, 378 U.S. 478 (1964).....9

Edwards v. Arizona, 451 U.S. 481 (1981).....6

Harris v. McRae, 448 U.S. 297 (1980).....2

Haynes v. Washington, 373 U.S. 503 (1963).....7

Illinois v. Perkins, 496 U.S. 292 (1990).....5

INS v. Chadha, 462 U.S. 919 (1983).....1

Jencks v. United States, 353 U.S. 657 (1957).....15

Katz v. United States, 389 U.S. 347 (1967).....15

Miranda v. Arizona, 384 U.S. 436 (1966).....(*passim*)

Moran v. Burbine, 475 U.S. 412 (1986).....5, 6

Morrison v. Olson, 487 U.S. 654 (1988).....2

Palermo v. United States, 360 U.S. 343 (1959).....15

United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975).....20

United States v. Eichman, 496 U.S. 310 (1996).....2

United States v. Vigo, 487 F.2d 295 (2d Cir. 1973).....20

Withrow v. Williams, 57 U.S. 680 (1993).....6

Page(s)

Statutes:

18 U.S.C. Section 3501, Title II, sec. 701, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210 ..... *passim*

Title III of the 1968 Act, 82 Stat. 211, 18 U.S.C. sec. 2510 *et seq.* 15

Legislative Materials

114 Cong. Rec. 11891 (May 6, 1968)(Sen. Tydings) 16

114 Cong. Rec. 11895 (May 6, 1968).....11

114 Cong. Rec. 13990 (May 20, 1968)(Sen. Tydings).....14

114 Cong. Rec. 14135 (May 21, 1989)(Sen. Fong).....16

114 Cong. Rec. 14148 (May 21, 1968).....11

114 Cong. Rec. 14180 (May 21, 1958)(Sen. Griffin).....17

114 Cong. Rec. 14181, 14184 (May 21, 1968).....18

114 Cong. Rec. 14184 (May 21, 1968).....16

114 Cong. Rec. 16067 (June 5, 1968).....17

Hearings on S. 300, S. 552, S. 580, S. 274, S. 275, S. 278, S. 798, S. 824, S. 916, S. 917, S. 992, S. 107, S. 1094, S. 1194, S. 1333, and S. 2050. Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. Of the Judiciary, 90th Cong., 1st Sess. 81 (1967) 12

President's Letter to the Majority Leader of the Senate Regarding the Crime Control and Safe Streets Bill, 4 Pub. Papers 772, 773 (May 9, 1968), reprinted in 114 Cong. Rec. 12450 (May 9, 1968).....16

Page(s)

Office of Legal Policy of the Department of Justice, *Report to the Attorney General on the Law of Pre-Trial Interrogation* (1986), reprinted in 22 U. Mich J.L. Reform 437 (1989).....21

Rule II(8) of the Rules of the House of Representatives 2

S. Rep. No. 170, 90th Cong., 2d Sess. (1968), 1968 U.S.C.C.A.N. 2112, 2138 .....12, 13, 14

Lyndon B. Johnson, *Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968* (June 19, 1968), in 4 Pub. Papers 981, 983 (June 19, 1968).....18

Testimony of Associate Professor Daniel C. Richman, Voluntary Confessions Law: Hearings of the Subcomm. On Administrative Oversight and the Courts of the Sen. Comm. On the Judiciary, 106th Cong., 1st Sess. (May 13, 1999), reprinted in 1999 WL 311272 (F.D.C.H.) 21

United States Department of Justice, *Memorandum: Title II of the Omnibus Crime Control and Safe Streets Act of 1968* (June 11, 1969), reprinted in 115 Cong Rec. 23236-38 (Aug. 19, 1969) 20

Miscellaneous

ABA Special Comm. On Criminal Justice in a Free Society, *Criminal Justice in Crisis* 28 (1988) 6

Note, Recent Statute: Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 82 HARV. L. REV. 1392 (1969).....12

Adam C. Breckenridge, *Congress Against the Court* (1970)..... 11

Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions*, 63 GEO. L.J. (1974) 18

Page(s)

Fred P. Graham, *The Self-Inflicted Wound* 305 (1970) 19

Gerald Gunther, *Constitutional Law* (11th ed. 1985).....12

Mark E. Herrmann, Note, *Looking Down from the Hill*, 33 WM. & MARY L. REV. 543 (1992).....19, 21

Wayne R. LaFave, *Constitutional Rules for Police: A Matter of Style*, 41 SYRACUSE L. REV. 849 (1990).....6

Laurie Magid, Essay, *The Miranda Debate: Questions Past, Present, and Future*, 36 HOUS. L. REV. 1251 (1999).....20, 21

Eric D. Miller, Comment, *Should Courts Consider 18 USC Sec. 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029 (1998).....17, 20, 21

Richard M. Nixon, *Toward Freedom from Fear* (May 8, 1968), reprinted in 114 CONG. REC. 12, 937 (May 10, 1968).....19

George C. Thomas, III, *Plain Talk About the Miranda Empirical Debate: A 'Steady-State' Theory of Confessions*, 43 U.C.L.A. L. REV. 933 (1996).....7

Charles Tiefer, *Congressional Practice and Procedure* (1989).....16

Charles Tiefer, *The Flag-Burning Controversy of 1989-90: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357 (1992).....12

Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47 (1998).....2

No. 99-5525

IN THE

Supreme Court of the United States

October Term, 1999

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE HOUSE DEMOCRATIC LEADERSHIP IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

In cases such as this one[1] where the constitutionality of an Act of Congress has been challenged, and the Executive Branch declines to defend that Act, *INS v. Chadha*, 462 U.S. 919 (1983), this Court has often received briefing by the Speaker and Bipartisan Leadership Group of the House of Representatives, or equivalent entities representing the House.

[1] Consent has been given to the filing of this brief, pursuant to Supreme Court Rule 37.3(a), by counsel for petitioner and respondent. In fulfillment of Supreme Court Rule 37.6, it is noted that (1) none of the counsel for parties authored any part of this brief, and (2) no persons or entities made such monetary contributions as Rule 37.6 specifies for identification herein.

See, e.g., Morrison v. Olson, 487 U.S. 654 (1988); *Burke v. Barnes*, 479 U.S. 361 (1987); *Bowsher v. Synar*, 478 U.S. 714 (1986). Rule II(8) of the Rules of the House of Representatives, provides for legal filings by the Office of General Counsel of the House "pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships." Rule II(8) indicates the majority leadership consists of the Majority Leader and the Majority Whip; the minority leadership consists of the Minority Leader and the Minority Whip. The majority and minority leaderships may, or may not, reach agreement on a position to present. In cases where they do not, the leadership group consisting of the leadership of one party may file separately. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1996)(amicus brief by Speaker and majority party leadership group); *American Foreign Service Association v. Garfinkel*, 490 U.S. 153 (1989)(amicus brief by Speaker and majority party leadership group).[2]

The posture of the case as it reaches this Court suggests that the Democratic Leadership ("House minority amicus" or "House Democratic amicus"), should present its views at this time to this Court as an *amicus curiae*.[3] This case presents the issue of whether a statute, 18 U.S.C. section 3501, supersedes *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* established safeguards for custodial interrogations that have

---

[2] *See generally* Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 Law & Contemp. Probs. 47 (1998). Minority party positions have been presented through amicus briefs by leading minority figures. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980)(amicus brief by Rep. Hyde (R-Ill.), successfully defending the challenged Hyde Amendment).

[3] Pursuant to House Rule II(8)'s reference to the "minority leadership," the Democratic Leadership consists of the Honorable Richard A. Gephardt, Democratic Leader, and the Honorable David E. Bonior, Democratic Whip.

come to occupy one of the highest places in the firmament of American constitutional traditions. Section 3501 has been the subject of significant debates regarding constitutionality by Congress and the Executive Branch both before and after passage. The importance of those debates makes this one of those cases in which it is appropriate for Congressional amici to present views to this Court.

As for the Democratic Leadership's particular interest in this case, amicus curiae believes its position in cases involving the constitutionality of statutes has been to demonstrate Congressional respect for the Constitution, and to encourage consideration of Congressional enactments in ways that allow this Court to view such enactments as being as much in harmony with the Constitution as possible. Nowhere is that as important as in statutes involving the balance established by the *Miranda* warnings and practices - a balance between effective law enforcement and the constitutional rights of all Americans. There are diverse views on that balance, and the House minority amicus seeks only to present its own views. It is hoped and believed that the Court's deliberations will benefit from the submission of our views on this vital subject.

While the Democratic Leadership's views have developed in the processes of consultation within the House, this Court's schedule in this case makes it appropriate for the Democratic Leadership to file prior to a filing, or an announced final decision about filing, by the majority leadership. If the majority leadership were to file in defense of the constitutionality of Section 3501 as construed by the Fourth Circuit, it might do so at a later date, at the point set for the respondent's brief to be filed, and, after that, this Court might regard the briefing schedule set for this case as making it too late for the minority leadership to submit views. Hence, the Court's established schedule in this case is the cause of the timing of this filing.

ARGUMENT

The United States Court of Appeals for the Fourth Circuit decided in this case that 18 U.S.C. Section 3501 had superseded *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioner will be joined by the United States, and by amici such as state and local law enforcement officials, in urging that the Fourth Circuit erred in underestimating *Miranda*'s constitutional status and this Court's commitment to adhere to its Fifth Amendment jurisprudence. House Democratic amicus also joins in such recognition of the firm support for *Miranda*, especially when the alternative to *Miranda* is recognized, namely, an unfortunate and chaotic situation in which both effective law enforcement, and Americans' confidence in their civil liberties, would suffer.

Furthermore, the House Democratic amicus will provide the Court with a specifically legislative viewpoint regarding the enigmatic Section 3501 enacted in Title II, sec. 701, of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210 (the "1968 Act" or the "Act"). Specifically, amicus submits that Section 3501 must be viewed in light of elaborate interactions between Congress and the Executive Branch both before and after its enactment. In *Dickerson*, the Executive Branch has not decided to *mount*[4] a challenge to *Miranda*; it has been the active effort of an *amicus curiae*, and the Fourth Circuit considering aspects of

---

[4] The term "to mount a challenge" will recur in this brief. It refers to a conscious policy decision by the Executive Branch, or state authorities, to make elaborate and sustained practical efforts to obtain a ruling by the Court that a previous ruling is overruled or regarded as superseded. To "mount a challenge" might include such practical aspects as the following: instructing law enforcement agencies to behave in ways that produce the sought-for challenges; instructing prosecutors to watch for, and to develop, promising cases for a challenge; presenting cases in trial and appellate tribunals in ways that maximize the likelihood of a successful challenge; and seeking, actively and frequently, this Court's consideration of such a challenge.

the matter *sua sponte*, that have made this case what it has become - a challenge in this Court to *Miranda*.

A review of section 3501's background and legislative history reveals that Congress provided little or no basis for expecting the Executive Branch to mount a successful challenge to *Miranda*. Before enactment, the Executive Branch had manifested (with strong support in Congress) its commitment to adherence to *Miranda* practices and to *Miranda*'s application, especially in federal cases. The final form of Title II of the 1968 Act, after a historic debate on the Senate floor, reflects a compromise between two warring factions. That compromise occurred between the faction in Congress much more interested in an election-year symbolic statement about law and order than in mounting an effective challenge to *Miranda*, and the faction opposed to the mounting of such a challenge.

Miranda's strong constitutional basis, and its extraordinary history of acceptance and success in federal law enforcement, receive no serious challenge when neither the legislative nor the executive branches considered it necessary to do so. This approach to the interpretative and constitutional questions seeks to balance effective law enforcement with the constitutional rights of Americans.

I. *Miranda's* Constitutional Basis, and This Court's Decades of Reaffirming *Miranda*, Prevent Congress From Simply Superseding It By a Provision Such As Section 3501.

Miranda itself discusses its constitutional basis, namely, how the *Miranda* warnings and *Miranda* practices safeguard the Fifth Amernment privilege against self-incrimination in the particularly intimidating situation of police custodial interrogation. Accordingly, this Court consistently describes *Miranda* and its corollary principles as having a constitutional basis. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296 (1990)(*Miranda* practices rest on "the Fifth Amendment privilege aginst self-incrimination"); *Moran v. Burbine*, 475

U.S. 412, 427 (1986)(describing *Miranda* as "our interpretation of the Federal Constitution"); *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981)(*Miranda* "determined that the Fifth and Fourteenth Amendments[]" required the famous warnings).

"*Miranda* [sought to] . . . reconcile opposing concerns" of "the need for police questioning as a tool for effective enforcement of criminal laws," and the "substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Moran v. Burbine*, 475 U.S. at 426-27. This Court has applied the *Miranda* system evenly to federal and state authorities alike, promoting a simple, straightforward, widely-understood and widely-accepted constitutional regimen for the whole nation. This could only be true of a constitutionally-based system, for if *Miranda* represented only an exercise of this Court's nonconstitutional supervisory power over federal cases, *Miranda* could not apply, as it has for over thirty years, in the judicial systems of all fifty states.

Yet, *Miranda*'s great success, in its decades of operation, has been its acceptance by state and local law enforcement authorities that initially considered the decision controversial. Surveys of law enforcement authorities, such as one by an ABA special panel including then-Dade County State's Attorney Janet Reno,[5] have shown that their initial skepticism about *Miranda* has given way to widespread acceptance and appreciation. "There is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow v. Williams*, 57 U.S. 680, 695 (1993); "one seldom hears complaints about *Miranda* from police; these days, *Miranda*-bashing is largely confined to those trying to make political hay." Wayne R. LaFave,

---

[5] ABA Special Comm. on Criminal Justice in a Free Society, *Criminal Justice in Crisis* 28 (1988).

Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 856 (1990). Scholarly studies showing that *Miranda* aids the smooth functioning of the criminal justice system while impeding clearance of extremely few criminal cases have refuted contentions to the contrary. *See, e.g.*, Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 Nw. U. L. Rev. 278 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996); George C. Thomas, III, *Plain Talk About the Miranda Empirical Debate: A 'Steady-State' Theory of Confessions*, 43 U.C.L.A. L. Rev. 933 (1996).

The alternative to *Miranda* suggested by a challenge based on section 3501 consists of returning to the pre-*Miranda* system summed up in *Haynes v. Washington*, 373 U.S. 503, 516-517 (1963). In place of *Miranda*'s clear, straightforward, well-understood model of warnings and practices, under that resurrected pre-*Miranda* system the federal courts would evaluate several non-exclusive factors in determining the voluntariness of statements made in custodial interrogations, and *Miranda*-model practices would lose their potency. In addition to the problems with how the pre-*Miranda* system functioned before the 1966 *Miranda* decision, in the year 2000 a return to the pre-*Miranda* system would produce unfortunate chaos. For example, police would not know whether by following *Miranda*-model practices, particularly by warning suspects of their rights, the police would help, or hurt, their efforts. In questioning suspects, police might imagine that by withholding the warnings they increased their chances of obtaining evidence, only to discover that by doing so they had tainted beyond use the statements of suspects who would have answered exactly the same, and provided admissible statements, had they received the warnings. For another example, under the *Miranda* system, suspects must expect that when they give statements to law enforcement agents who adhere to *Miranda*-model practices, those statements will be admitted against them. With a return to the pre-*Miranda* system, defendants might

well consider it much more promising and routine to put their effort into winning the now-murky contests about the voluntariness and admissibility of their statements, burdening the criminal justice system with endless disputes at every level over collateral issues.

II. Congress Provided Little or No Basis in Section 3501 For a Challenge to *Miranda*

Rather than duplicate the submissions of the United States and of other amici in their addressing at length the jurisprudence of *Miranda*, this submission will focus on the legislation at issue in this case, section 3501. Specifically, Congress did not enact section 3501 out of a conviction that the provision would treat a serious problem worth mounting a serious challenge to *Miranda* or that there should or would necessarily be a serious challenge mounted to *Miranda*. Rather, Congress enacted section 3501 largely for symbolic purposes, to make an election-year statement in 1968 about law and order, not to mount a challenge to *Miranda*.

In context, Congress had every reason to expect and to intend what ultimately transpired, namely, that section 3501 has not been used by the Executive Branch to challenge *Miranda* in this Court. As the dissenting opinion in the Fourth Circuit begins, "Thirty years have passed since Congress enacted 18 U.S.C. sec. 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use sec. 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that sec. 3501 must be invoked." 166 F.3d at 695 (Michael, J., dissenting in part and concurring in part). "In fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." *Davis v. United States*, 512 U.S. 452, 463-64 (1994)(Scalia, J., concurring). The pre- and post-enactment context of section 3501 undermines fatally the argument that the provision supersedes

Miranda, particular in a case such as this in which the Executive Branch remains faithful to its practice of over thirty years and does not ask this Court to find *Miranda* statutorily superseded.

A. As the Context of the 1968 Enactment Shows, Congress Had Little Basis for Challenging *Miranda* By a Statute, Such as Section 3501, Applicable Only in Federal Cases

The 1968 Act developed in a legislative process which raises the question of how much, if any, basis for challenging *Miranda* underlies section 3501. A review of the legislative history shows several aspects that force that question. First, the enacting Congress had every reason to see how very likely it was that the Executive Branch would continue to accept *Miranda* even after enactment of section 3501. The legislative history shows section 3501 to be a largely symbolic election-year statement rather than a firm decision to challenge *Miranda*. Second, the context shows just how controversial challenging *Miranda* was, reflecting why Congress could, and did, compromise by enacting section 3501 in a way that did not assure such a challenge. Congress let the Executive Branch decide whether to mount a serious challenge to *Miranda* - and for seven Administrations it has decided against doing so.

During the 1960s, in the lead-up to *Miranda*, this Court's primary concern regarding the voluntariness of custodial interrogations lay with state and local, not federal, interrogations. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478 (1964), and cases cited therein. *Miranda* addressed constitutionally dubious "present police practices" about which information "may be found in various police manuals and texts," 384 U.S. at 448, not federal investigative practices or federal manuals.[6] A striking aspect of section 3501 would

---

[6] A variety of reasons had led to the federal judiciary focusing thusly on state and local compared with federal custodial interrogations: the

be overlooked unless that federal-state comparison is kept in mind. Namely, Congress wrote section 3501 so that only federal authorities, not state authorities, could invoke it. In context, it becomes clear why, though *Miranda* was controversial on the state level, Congress ultimately enacted only at the federal level: the Congressional enactment was intended to serve largely symbolic purposes, rather than to actually succeed in having this Court declare *Miranda* overruled or superseded.

Moreover, the *Miranda* Court, and the *Miranda* opinion, consciously and visibly made the major point that the *Miranda* warnings and related restrictions reflected previously longstanding, satisfactory FBI self-imposed practices. *Miranda* describes how the Court *sua sponte* asked the Solicitor General for information about FBI practices. *Id.* at 483-86. Using the answers, *Miranda* declares that "the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay." *Id.* at 483. Congressional opponents of a challenge to *Miranda* made the same point. The Senate knew from floor speeches by a Senator who was a former federal prosecutor that the FBI's commitment to *Miranda*-model practices dated back to 1952.[7] At the same time, *Miranda* invited

---

diversity of the fifty states and numerous localities compared with the single federal government; the different types of crime investigated by state and federal authorities; the self-imposed, self-restraining practices of the Federal Bureau of Investigation; and, the different capabilities of the federal judiciary to address defendants' rights in cases prosecuted before them compared to state cases appealed to the Supreme Court or collaterally challenged.

[7] The most vigorous voice on the Senate floor during the successful effort to trim back Title II as reported from committee was Senator

equivalently effective alternative practices to protect the constitutional rights it analyzed.

The result was that, as the issue came to Congress, the Court had underlined the acceptability of *Miranda* warnings to the FBI. *Id.* Congress had to factor into any enactment the calculation that whatever quarrel state authorities might have with *Miranda*, since *Miranda* approved the existing federal practices, federal law enforcement authorities would have little or no reason to want or to need to challenge *Miranda*.

B. The Process of Passage, and the Final Form of Title II, Show Congress Expecting No Challenge to *Miranda* Absent a Change in Executive Branch Opposition to Doing So.

In 1967, President Johnson proposed, and the House adopted, a grants program for state law enforcement that served as the vehicle for the 1968 Act. Title II took shape in 1967-68 in the Senate Judiciary Committee initially, and then on the Senate floor. That title was shaped by the Senate Judiciary Committee, chaired by Senator Eastland (D-Miss.). Senator Eastland was a well-known leading voice in the 1960s Senate for addressing Warren Court decisions using the blunt tools of jurisdiction-stripping and attempted legislative overruling of decisions. *See generally* Adam C. Breckenridge, *Congress Against the Court* 39-94 (1970). The initial legislative proposals which became the first draft of Title II of the 1968 Act employed Chairman Eastland's familiar blunt tools against *Miranda*, notably, the tool of cutting off this Court's direct review and the federal courts' collateral review of state cases involving *Miranda*.[8] In other

---

Tydings, who often noted his prosecutorial service as a United States Attorney. He quoted repeatedly and at length from statements by J. Edgar Hoover regarding the FBI's commitment to *Miranda*-model practices during the previous two decades. 114 Cong. Rec. 11895 (May 6, 1968); *id.* 14148 (May 21, 1968).

[8] "[E]xercise of jurisdiction by Federal courts is disruptive and tends to dilute the State's enforcement of its criminal laws. To counteract this

words, Senator Eastland initially moved legislation that would have put the issue of challenging *Miranda* beyond the discretion of federal law enforcement authorities, by granting state authorities a powerful federal tool with which to mount such a challenge.

At the same time, the record developed by the Senate Judiciary Committee underlined emphatically the issue of whether the enactment left to federal authorities whether to use the statute to challenge *Miranda*. Notably, the Attorney General wrote the Senate Judiciary Committee that an attempt simply to dispense with the safeguards of *Miranda* was unconstitutional.' In context, the Attorney General's position followed directly from the Solicitor General's position in this Court in the build-up to *Miranda*, and from the FBI's practices approved by the opinion in *Miranda*. Yet, the Attorney General's position had special meaning in gauging how serious Congress was about whether practical policy

---

disruptive practice, title II limits Federal jurisdiction to review a State court's final decision as to voluntariness of a confession . . . ." S. Rep. No. 170, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2138. For a discussion of the 1968 Senate bill's initial court-stripping provisions and a comparison with similar efforts of the preceding decade, see Gerald Gunther, *Constitutional Law* 47 & n.11 (11th ed. 1985), and sources cited therein. For further background and analysis of Congressional consideration of such court-stripping tools, see Charles Tiefer, *The Flag-Burning Controversy of 1989-90: Congress' Valid Role in Constitutional Dialogue*, 29 Harv. J. on Legis. 357, 392-98 (1992).

[9] "A review of S. 674 [which provided what became Title II] indicates a conflict with the 1966 decision by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436. . . . If S.674 is intended to dispense with the procedural safeguards established by *Miranda* . . . . it would be in conflict with current constitutional requirements." Letter by the Attorney General to Senator John L. McClellan (June 19, 1967), in *Hearings on S. 300, S. 552, S. 580, S. 274, S. 275, S. 278, S. 798, S. 824, S. 916, S. 917, S. 992, S. 107, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. Of the Judiciary*, 90th Cong., 1st Sess. 81 (1967); *see* Note, *Recent Statute: Title II of the Omnibus Crime Control and Safe Streets Act of 1968*, 82 Harv. L. Rev. 1392, 1398 (1969).

considerations necessitated a challenge to *Miranda*. The Attorney General's position awakened both proponents and opponents of a challenge to *Miranda* that if they left what to do with the provision to the Attorney General, they were leaving the provision to someone who did not favor such a challenge.

This was not an obscure piece of legislative history, subject to the charge of being squirreled away in the dead of night by minor staffers working with special-interest lobbyists. The Attorney General told the Senate Judiciary Committee, at a moment when law-and-order issues very much had the Members' full attention, something they could fully appreciate for its significance in the legislative world. In plain English, the Attorney General was taking the political heat for not challenging *Miranda*. The Senate's center, polarized between those who wanted to enact a symbolically anti-*Miranda* provision, and those who sought not to challenge *Miranda*, could find a middle ground. Senators in the center could enact a provision to take up the Attorney General's offer, in effect, to take the heat, by enacting a provision which, while symbolically anti-*Miranda*, would leave the decision whether to mount a challenge to *Miranda* to the Attorney General who had so helpfully announced his adherence to *Miranda*.

Ultimately, after the Senate Judiciary Committee reported out the 1968 bill, it wrote an incendiary committee report supporting a challenge to *Miranda*. S. Rep. No. 170, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112. This has been taken by some as reflecting a clear Congressional intent to force such a challenge without regard to the view of the Executive Branch. The majority opinion of the Fourth Circuit so cited the report, quoting it repeatedly, and at length. 166 F.3d at 686. This is a superficial reading of the legislative history. The committee reported Title II on the weakest possible basis, a tie vote, not foreshadowing what would ultimately be the Congressional intent underlying the enactment, much less eager to see *Miranda* challenged. 114

Cong. Rec. 13990 (May 20, 1968)(Sen. Tydings)("title II . . . is presently retained in that measure as a result of a tie vote of 8 to 8 of the Senate Judiciary Committee").

Even looking just at Chairman Eastland's strategy in that report, he chose not to establish a promising foundation for any definite challenge. His report claimed that the committee had built up a record against *Miranda*, and left it at that.[10] Notably, the report did not seriously take up *Miranda*'s own invitation[11] to proffer equivalently effective alternative safeguards to supplant *Miranda*'s. Chairman Eastland's decision against the more promising approach of setting up alternatives to supplant *Miranda* cannot be explained away as that nothing could be proposed as an alternative to *Miranda* that would be easy for law enforcers to perform. Both at the time, and today, some proponents of alternatives to *Miranda* have urged that something as limited as videotaping confessions might be tried.[12]

Chairman Eastland's choice not to establish a more promising foundation for a challenge to *Miranda* reflects the particular legislative context. In Title III of the 1968 Act

---

[10] "Passage of this bill with all of its legislative history . . . will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices." S. Rep. No. 170, *supra*, 1968 U.S.C.C.A.N. at 2133.

[11] "It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities . . . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467; *accord id.* at 477, 479.

[12] By contrast, the other side in the debate over alternatives to *Miranda* has suggested that equivalent safeguards would involve more than "lightweight" alternatives, such as a combination of interposition of neutral and professional magistrate-like figures for interrogation as in the continental system, and restrictions, clarified and heightened, on what constitutes improper interrogation tactics.

itself,[13] and in another statute dealing with evidence, the Jencks Act,[14] the Congress had desired strongly an assured actual effect of addressing judicial restraints on FBI procedures, not just something largely symbolic. So, in those statutes, Congress had put forth a new system to respond to criticisms of unrestrained practices.[15] By contrast, in this context, since the FBI had long accepted *Miranda*-model procedures, federal law enforcers neither sought, nor did those in Congress have to seek for them, an assured actual effect of modifying judicial restraints. This allowed Chairman Eastland's committee to forego establishing an alternative

---

[13] This Court had decided *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), regarding electronic eavesdropping. Title III of the 1968 Act itself, 82 Stat. 211, 18 U.S.C. sec. 2510 et seq., solved the problem of the requirements of the *Berger* and *Katz* cases by mandating the system for warrants for electronic eavesdropping. Title III did not just make a symbolic statement that the Court should go back to the law before *Berger* and *Katz*; it created a new system for law enforcers.

[14] The Jencks Act solved the problem of the requirements of production of prior statements by government witnesses imposed by this Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957). That act, codified as 18 U.S.C. sec. 3500, did not just make a symbolic statement that the Court should go back to the law before *Jencks*. It created a system which involved new practices, procedures and duties for the FBI. (In *Palermo v. United States*, 360 U.S. 343 (1959), this Court accepted Congress' modification of *Jencks*' standards. It should be noted that the Court's decision in *Jencks* was based on supervisory powers over federal cases. Hence, on that ground as well, the sequence of Congress enacting a statute in that instance in response to a Supreme Court decision is distinguishable from the enactment of section 3501.)

[15] The Congresses that enacted the Jencks Act, and Title III of the 1968 Act itself, had taken the route of putting forth codes of law enforcement procedures regarding, respectively, production of witnesses' prior statements, and electronic eavesdropping. In those enactments, Congress thereby assured, and obtained, an actual effect on law enforcement procedures, such as restoring to the FBI tools of accumulating different kinds of witness interview statements, and court-authorized wiretapping, that the FBI feared would be impaired or lost by Supreme Court decisions.

system with a definite probability of impressing the judiciary. Rather, he could pursue an approach, by not putting forth even limited alternative safeguards to *Miranda*'s, that produced no assured likelihood affecting *Miranda*, but achieved more political objectives. Namely, section 3501 would demonstrate to the public, in an election year, a concern for law and order and an opposition to the asserted excessive leanings of the Warren Court. This, however, only required that section 3501 go on the books, not that it force an actual court case challenging *Miranda*, and certainly not that it force one with serious prospects for successfully challenging *Miranda*.

More important, when Chairman Eastland's committee's reported bill came to the Senate floor, the Senate voted[16] to change the reported Title II, eliminating the provisions that would have allowed a challenge to *Miranda* to be mounted by state authorities even without a central role for federal authorities. In a major Senate debate, opponents of the reported Title II charged *Miranda*'s constitutional nature made Title II unconstitutional.[17] Reinforcing the testimony of the Attorney General, President Johnson wrote to Majority Leader Mansfield to inform the debating Senate. The President urged passage of the bill's gun control and grant provisions while recommending "not encumbering the legislation with provisions raising grave constitutional questions." President's Letter to the Majority Leader of the Senate Regarding the Crime Control and Safe Streets Bill, 4

---

[16] The Senate's action on floor amendments often "signifie[s] the real division in the Senate," Charles Tiefer, Congressional Practice and Procedure 646 (1989), while the vote on final passage is "unanimous or lopsided, which serve[s] only symbolic purposes." *Id.*

[17] *See, e.g.*, 114 Cong. Rec. 11891 (May 6, 1968)(Sen. Tydings)("blatant attempt to amend the Constitution by a simple legislative enactment"); *id.* 14135 (May 21, 1989)(Sen. Fong)("Since section 3501 dispenses with these safeguards, the section is contrary to the present requirements of the Constitution."); *id.* 14184 (Sen. Brooke)("I do not think Miranda v. Arizona can be reversed by statute").

Pub. Papers 772, 773 (May 9, 1968), reprinted in 114 Cong. Rec. 12450 (May 9, 1968).[18]

Leading conservative Republican Senators, while voting to leave the largely symbolic section 3501 in the bill, vocally and bravely led the bipartisan effort that removed the provisions regarding state cases.[19] When the bill went back to the House, a similar debate occurred, with similar charges about unconstitutionality.[20] Moreover, proponents of Title II in the House took a route to adoption that prevented serious House consideration of section 3501, evidently expecting that such consideration would have led to the provision's elimination from the bill.[21]

Beyond what was said in the debate, what matters was the textual effect of what the Senate did. By eliminating the provisions that would have let state authorities challenge

---

[18] *See Eric D. Miller*, Comment, *Should Courts Consider 18 USC Sec. 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029 (1998), at n.27.

[19] 114 Cong. Rec. 14180 (May 21, 1968)(Sen. Griffin)(quoting a law professor that "I regard Title II as fully as ominous an assault on the Supreme Court as the court-packing proposal of the 1930's").

[20] House Judiciary Committee Chairman Celler, who denounced Title II as unconstitutional, placed in the record a detailed analysis of the constitutional issue of Title II, with conclusions such as: "even though Congress has broad general power under the Constitution to enact procedural rules governing the admissibility of evidence in Federal Courts, nothing in the Constitution gives Congress the power to adopt procedural rules that overrule specific decisions of the Supreme Court interpreting the fundamental requirements of the Constitution." 114 Cong. Rec. 16067 (June 5, 1968).

[21] The bill did not go to conference because House procedures allowed House conservatives to get a straight up-or-down vote on the version of the bill as passed by the Senate. This maneuver was accurately described by both sides on the House floor as aimed at preventing House Judiciary Committee Chairman Celler from eliminating section 3501 in conference.

Miranda,[22] the amending Senators set up a situation where they had every reason to expect that it remained up to the federal Attorney General whether to mount a challenge to *Miranda* using the pared-down Title II. Again, the contemporaneous context underlines this point. The immediate Executive reaction mirrored the previously described extant FBI *Miranda*-model practices, Attorney General testimony, and Presidential communication. In rapid succession, President Johnson's signing statement for the Act in June 1968 announced that the FBI's practice of *Miranda*-model warnings would continue and that the statute would be "interpreted in harmony with the Constitution."[23] Then, the Attorney General instructed U.S. Attorneys to offer into evidence only confessions obtained in accordance with *Miranda*.[24]

Accordingly, the majority opinion of the Fourth Circuit panel took too simple a view of the legislative history of the 1968 Act. In that hard-fought enactment process, proponents and opponents of a challenge to *Miranda* ended up enacting a version of Title II shaped as a rough compromise, in light of the difference between the outgoing Administration that certainly did not intend to use Title II to mount a challenge to

---

[22] The votes to take provisions out of Title II are at 114 Cong. Rec. 14181, 14184 (May 21, 1968).

[23] Lyndon B. Johnson, Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968 (June 19, 1968), in 4 Pub. Papers 981, 983 (June 19, 1968)("Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue.").

[24] Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions*, 63 Geo. L.J. 305, 311-12 (1974); Miller, *supra*, 65 U. Chi. L. Rev. at nn. 27-31.

Miranda and a potential incoming one that just might.[25] The compromise took the power to mount such a challenge away from state authorities who would surely have launched it, and left the provision only in the domain of federal authorities of contemporary and future administrations. It was a Senate outcome that resolved the heated constitutional and political debate between the two sides, not by altering or circumventing the federal law enforcement community's acceptance of *Miranda*, but by factoring in that acceptance by letting a statute emerge that was largely symbolic.

C. The History of Section 3501 Confirms Congress' Expectation That Section 3501 Would Serve Symbolic Purposes Rather Than Producing a Serious Challenge to *Miranda*.

For over thirty years, federal law enforcers have declined to mount the kind of challenge to *Miranda* that might have even a small likelihood of success. That history deserves judicial deference. It is not the history of a prosecutorial

---

[25] During this shaping and enactment of the bill in May and June 1968, the Congressional Record reveals another aspect that further confirms the significance of section 3501's dependence on Attorney General invocation. With campaigning in full swing for the upcoming November 1968 election, the President's message signaled that election of a Democratic candidate would likely continue the current Administration's policies, including not challenging *Miranda*. On the other side, the Republican candidate, Richard M. Nixon, campaigned with an endorsement of Title II placed in the Congressional Record during the debate on Title II, signaling that upon his election, the next Administration might invoke legislation like section 3501 to challenge *Miranda*. Few matters regarding a provision could interest Senators more than a square contrast in campaign positions between the current Administration and the next. Richard M. Nixon, *Toward Freedom from Fear* (May 8, 1968), reprinted in 114 Cong. Rec. 12,937-38 (May 10, 1968)(statement by then-candidate Nixon to "urge Congress to enact proposed legislation that - dealing with . . . Miranda . . . - would leave it to the judge and the jury to determine both the voluntariness and the validity of any confession"); Fred P. Graham, The Self-Inflicted Wound 305-32 (1970); Mark E. Herrmann, Note, *Looking Down from the Hill*, 33 Wm. & Mary L. Rev. 543, 576-86 (1992).

quest to cut back civil liberties which might lead judges carefully to consider recognizing fully those liberties. Rather, it is a history of prosecutorial self-restraint, transcending political party and ideological orientation, in recognition of the special nature of *Miranda*. That represents a sound balance between effective law enforcement and the constitutional rights of all Americans worthy of judicial deference.

As previously noted, immediately following enactment, the Johnson Administration interpreted section 3501 as leaving Executive Branch discretion to preserve existing FBI *Miranda*-model practices, and as allowing the Attorney General to decide whether to invoke the section, which he decided against doing. In the Nixon Administration that began the following year, Attorney General Mitchell made symbolic statements that section 3501 could be invoked in some very limited circumstances,[26] and there were ensuing cases.[27] But, as a practical matter, the Nixon Administration did not attempt to change custodial interrogation practices, did not attempt to employ section 3501 in a way that would likely produce a test in this Court of *Miranda*, and left section 3501 largely uninvoked.[28] There was no authoritative explanation of this. It is fair to surmise that the Nixon Administration considered Title II as a symbolic issue in the

---

[26] *See* United States Department of Justice, Memorandum: Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (June 11, 1969), reprinted in 115 Cong Rec. 23236-38 (Aug. 19, 1969).

[27] Examples include *United States v. Crocker*, 510 F.2d 1129, 1136-38 (10th Cir. 1975)(on the one hand, "the trial court did not err in applying the guidelines of sec. 3501"; on the other hand, there was also "full compliance with the Miranda mandates"); *United States v. Vigo*, 487 F.2d 95, 299 (2d Cir. 1973)(declining to determine section 3501's constitutionality).

[28] Miller, *supra*, at note 32; Laurie Magid, Essay, *The Miranda Debate: Questions Past, Present, and Future*, 36 Hous. L. Rev. 1251, 1275 (1999).

1968 campaign, but once in office, it did not find Title II necessary for the serious task of effective law enforcement. Moreover, *Miranda*'s rapid acceptance even by local law enforcement authorities took away any reason that an Attorney General might see for mounting an actual challenge to *Miranda*.

In any event, the pattern established by the Johnson and Nixon Administrations continued in later administrations.[29] In 1986, the Office of Legal Policy published a report to Attorney General Meese with seemingly significant statements about *Miranda* and section 3501.[30] However, the Justice Department largely continued its prior pattern, which did not lead to any cases in this Court using section 3501 to challenge *Miranda*.[31] The 1990s has been the occasion of renewed debate, and some judicial activity (such as the Fourth Circuit's decision), but no change in the Executive Branch's consistent approach of not mounting a major challenge to *Miranda* in this Court using section 3501.[32]

---

[29] "Later administrations have not strayed from Nixon's lead in following Miranda rather than section 3501 . . . ." Herrmann, *supra*, at 583.

[30] Office of Legal Policy of the Department of Justice, Report to the Attorney General on the Law of Pre-Trial Interrogation (1986), reprinted in 22 U. Mich. J.L. Reform 437 (1989).

[31] Magid, *supra*, at 1276; Miller, supra, at n. 35 ("However, the [Reagan] Administration does not appear to have succeeded in obtaining any court rulings on Section 3501.").

[32] Testimony at a Senate hearing last May included a discussion by a former federal prosecutor of why the Justice Department of the past decade could properly, and did, decide to not invoke section 3501. Testimony of Associate Professor Daniel C. Richman, *Voluntary Confessions Law: Hearings of the Subcomm. On Administrative Oversight and the Courts of the Sen. Comm. On the Judiciary*, 106th Cong., 1st Sess. (May 13, 1999), reprinted in 1999 WL 311272 (F.D.C.H.). This provides a useful account from the 1990s perspective.

While there are those who label the Executive pattern as a failure to faithfully execute the laws, Congress has not reacted that way. Section 3501 is a provision that sits on the books as a largely symbolic statement. When seven Administrations over 30 years have not mounted a challenge to *Miranda*, such a continuing consistent judgment is responsible and should be given weight.

III. If Section 3501 is Interpreted to Require This Court to Deem *Miranda* Superseded In This Case, The Provision Is Unconstitutional As So Interpreted

House Democratic amicus will not duplicate the full treatments by the United States, and by other amici, of the conflict between section 3501 and the constitutional rights involved in *Miranda*. Amicus agrees with the United States that *Miranda*'s constitutional roots, strengthened by its long history of success in law enforcement operation as well as by this Court's fidelity to *stare decisis*, put *Miranda* beyond being superseded by section 3501, particularly since the provision proposes no alternative set of safeguards. While the United States has not sought independent review of the unusual path by which section 3501 reached this Court, that path underlines the special constitutional problems with deeming *Miranda* superseded by section 3501 as applied in this case. The sequence in this case - notably that federal authorities believed they had complied with, and sought to comply with, *Miranda* and did not raise section 3501 in the Court of Appeals - underlines the symbolic aspects of an application of the provision in this case. This is made evident by drawing on the foregoing review of the positions of Congress and the Executive Branch before and after enactment.

First, the decision in the past 30 years not to mount a challenge to *Miranda* based on section 3501 has resulted from the exercise by a succession of Attorneys General of what has proven to be sound judgment. When Congress enacted section 3501, Congress expected, as described above, that

while the current (Johnson) Administration would not mount a challenge to *Miranda*, the next Administration just might decide to do so. If that had occurred, or if any of the six successor Administrations had decided to do so, at least the exercise of that Administration's judgment would presumably represent the fulfillment of Congress' expectations as to the existence of a basis to mount a challenge to *Miranda*. No such exercise of judgment by the Executive Branch has occurred. Moreover, the use of section 3501 in this case has proceeded without the support of the insulated, nonpolitical prosecutorial personnel, such as the Justice Department and FBI career levels, who for thirty years have followed *Miranda* without recommending the mounting of a challenge.

Second, the application of section 3501 to this case, in which federal law enforcement authorities did not decide in favor of mounting a challenge to *Miranda*, weighs Congressional power against a constitutional decision of this Court, without Congress having found, ether certainly or contingently, a problem calling for necessarily overruling that decision. The record created by the Senate Judiciary Committee, and described in its report, overwhelmingly concerned whether *Miranda* interfered with local law enforcement. The Senate committee intended this to support Title II as reported, which cut off federal review of state cases, while section 3501, which the Senate left in when it eliminated other provisions, concerns only federal law enforcement. Section 3501 made it to passage, not because of any problem in federal law enforcement, but for quite the opposite reason. Existing FBI practices, which there was no reason to change, meant there was no serious problem with *Miranda* in federal law enforcement; so, legislating largely symbolically only for federal cases became the middle ground between Senators who wanted a symbolic statement against *Miranda* and those who wanted no definite mounting of a challenge to *Miranda*. Therefore, Congress did not definitively decide in 1968 it was facing a problem with *Miranda* as it applied to federal law enforcement that necessitated a challenge to *Miranda*. Moreover, to the extent

that some in Congress might hope, contingently, that if the Executive Branch decided to mount such a challenge, *Miranda* might be superseded, even that contingency has not occurred. Whatever Congress' power to force a challenge to *Miranda* when it decides this is necessary to solve a problem, the situation is different when Congress has neither certainly, nor even contingently, found that such a problem exists.

In sum, the application of section 3501 in this case challenges *Miranda* without either the legislative or the executive branch making the determination that there is a definite need to do so. If the Court must reach the issue of section 3501's constitutionality, a statutory application so at odds with the proper working of our constitutional system should not be upheld. Whereas in *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997), the United States could argue that an extensive legislative record showed the challenged act dealt with national problems - in a word, that both the legislative and executive branches supported the act - the strained application of section 3501 is one which neither the enacting Congress, nor the Executive Branch, considers as dealing with such problems. That makes a much weaker case than was presented, without success, in *City of Boerne* - too weak a case for the statutory application to be upheld as constitutional.

It may be asked why a Congressional amicus would ever urge this conclusion. The answer is that Congressional amici have often argued against indefensible statutory applications, and this Court has found merit in those arguments. *See, e.g.*, *AFSA v. Garfinkel*, *supra*. Using section 3501 in this case to declare *Miranda* superseded does not represent a balance between effective law enforcement and the constitutional rights of all Americans of the kind a conscientious Congress seeks to enact. House Democratic amicus opposes it, and this Court should not adopt it.

CONCLUSION

Congress enacted Section 3501 with little or no basis for a challenge to *Miranda*, particularly absent a decision by federal law enforcement authorities to mount such a challenge. The process of section 3501's enactment, and the consistent decision against mounting such a challenge by the Johnson, Nixon, Ford, Carter, Reagan, Bush, and Clinton Administrations, show that the Fourth Circuit erred. *Miranda* should easily survive this case.

Respectfully submitted

CHARLES TIEFER
(*Counsel of Record*)
Associate Professor
University of Baltimore School of Law
1420 North Charles Street
Baltimore, MD 21201
(301) 951-4239

Jonathan W. Cuneo
The Cuneo Law Group
317 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 789-3960

Counsel for *Amicus Curiae*
House Democratic Leadership

(18)

Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

STEVEN R. SHAPIRO
VIVIAN BERGER
SUSAN N. HERMAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

JONATHAN L. ABRAM*
AUDREY J. ANDERSON
STEPHEN M. KUPERBERG
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5681

STEPHEN SCHULHOFER
1111 East 60th Street
Chicago, IL 60637

* Counsel of Record

Counsel for Amicus Curiae

42 pp

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT'S *MIRANDA* DECISION IS AN APPROPRIATE AND NECESSARY MEANS OF ENFORCING THE FIFTH AMENDMENT 3

A. The Fifth Amendment Privilege Against Self-Incrimination Reflects Core Values of Our System of Criminal Justice 3

B. The Due Process Voluntariness Test was Unworkable and Gave No Guidance to Courts or the Police 5

C. In Rejecting a "Totality of the Circumstances" Test, *Miranda* is Consistent With This Court's Traditional Approach to Defining Fifth Amendment Compulsion 7

D. *Miranda's* Workable Rules Have Become Part of Our Constitutional Heritage and Should Not Be Cut Back 11

II. CUSTODIAL INTERROGATIONS ARE AS INHERENTLY COMPELLING TODAY AS THEY WERE WHEN *MIRANDA* WAS DECIDED 14

A. More Than Thirty Years After *Miranda*, the "Interrogation Room" Remains an Inherently Compelling Environment 14

B. Police Willingness to Interrogate In Violation of *Miranda* Underscores the Continuing Importance of *Miranda* to Protect Suspects' Rights 16

TABLE OF CONTENTS—Continued

Page

III. THE *MIRANDA* REQUIREMENTS DO NOT SIGNIFICANTLY BURDEN LAW ENFORCEMENT 19

A. Police and Prosecutors Widely Believe That *Miranda* Does Not Burden Law Enforcement 21

B. Data Confirm That *Miranda* Does Not Impede Law Enforcement 23

C. Professor Cassell's Empirical Claims About *Miranda*'s "Costs" Do Not Withstand Scrutiny 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Anders v. *California*, 386 U.S. 738 (1967) 10

Ashcraft v. *Tennessee*, 322 U.S. 143 (1944) 7,14

Bram v. *United States*, 168 U.S. 532 (1897) 4

Brewer v. *Williams*, 430 U.S. 387 (1977) 10

Brooks v. *Tennessee*, 406 U.S. 605 (1972) 9

Brown v. *Mississippi*, 297 U.S. 278 (1936) 6-7

Brown v. *Board of Education*, 347 U.S. 483 (1954) 13

Bruton v. *United States*, 391 U.S. 123 (1968) 10

California Attorneys for Criminal Justice v. *Butts*, 195 F.3d 1039 (9th Cir. 1999) 18

Carter v. *Kentucky*, 450 U.S. 288 (1981) 9

Cooper v. *Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (*en banc*) 17,18

Couch v. *United States*, 409 U.S. 322 (1973) 4

Crooker v. *California*, 357 U.S. 433 (1958) 7

Cruz v. *New York*, 481 U.S. 186 (1987) 10

Edwards v. *Arizona*, 451 U.S. 477 (1981) 12

Escobedo v. *Illinois*, 378 U.S. 478 (1964) 4-5

Fare v. *Michael C.*, 442 U.S. 707 (1979) 12

Fikes v. *Alabama*, 352 U.S. 191 (1957) 6

Gardner v. *Broderick*, 392 U.S. 273 (1968) 9

Garrity v. *New Jersey*, 385 U.S. 493 (1967) 9

Gray v. *Maryland*, 523 U.S. 185 (1998) 10

TABLE OF AUTHORITIES—Continued

Page

CASES:

Griffin v. *California*, 380 U.S. 609 (1965)..... 9
Harris v. *South Carolina*, 338 U.S. 68 (1949)..... 6
Hoffman v. *United States*, 341 U.S. 479 (1951)..... 8
Johnson v. *New Jersey*, 384 U.S. 719, 730 1966)..... 5
Kastigar v. *United States*, 406 U.S. 441 (1972)..... 8
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977)..... 9
Lefkowitz v. *Turley*, 414 U.S. 70 (1973)..... 9
Leyra v. *Denno*, 347 U.S. 556 (1954)..... 6
Malinski v. *New York*, 324 U.S. 401 (1945)..... 6
Malloy v. *Hogan*, 378 U.S. 1 (1964)..... 3-4
Massiah v. *United States*, 377 U.S. 201 (1964)..... 10
Michigan v. *Mosley*, 423 U.S. 96 (1975)..... 12
Michigan v. *Tucker*, 417 U.S. 433 (1974)..... 12,13,20
Miller v. *Fenton*, 474 U.S. 104 (1985)..... 5-6
Mincey v. *Arizona*, 437 U.S. 385 (1978)..... 8
Minnesota v. *Murphy*, 465 U.S. 420 (1984)..... 11,21
Minnick v. *Mississippi*, 498 U.S. 146 (1990)..... 12
Miranda v. *Arizona*, 384 U.S. 436 (1966)..... *passim*
Moran v. *Burbine*, 475 U.S. 412 (1986)..... 4,11,12
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964)..... 4
New Jersey v. *Portash*, 440 U.S. 450 (1979)..... 8-9

TABLE OF AUTHORITIES—Continued

Page

CASES:

New York v. *Quarles*, 467 U.S. 649 (1984)..... 12,13
Oregon v. *Elstad*, 470 U.S. 298 (1985)..... 12,13
Oregon v. *Hass*, 420 U.S. 714 (1975)..... 12,16
People v. *Bradford*, 929 P.2d 544 (Cal. 1997)..... 17
People v. *Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 119 S. Ct. 595 (1998)..... 17
People v. *Winsett*, 606 N.E 2d 1186 (Ill. 1992), *cert. denied*, 510 U.S. 831 (1993)..... 17
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992)..... 13-14
Reck v. *Pate*, 367 U.S. 433 (1961)..... 6
Rhode Island v. *Innis*, 446 U.S. 291 (1980)..... 2,21
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973)..... 11
Smith v. *Robbins*, No. 98-1037, slip op. (Jan. 19, 2000)..... 10
Spano v. *New York*, 360 U.S. 315 (1959)..... 6
State v. *Favero*, 331 N.W.2d 259 (Neb. 1983)..... 17
Stein v. *New York*, 346 U.S. 156 (1953)..... 6,7
Stroble v. *California*, 343 U.S. 181 (1952)..... 7
Turner v. *Pennsylvania*, 338 U.S. 62 (1949)..... 6
United States v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999)..... 7
United States v. *Henry*, 447 U.S. 264 (1980)..... 10
United States v. *Nixon*, 418 U.S. 683 (1974)..... 8

TABLE OF AUTHORITIES—Continued

Page

CASES:

United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 5,11

United States v. *Wilson*, 421 U.S. 309 (1975) 9

Washington v. *Texas*, 388 U.S. 14 (1967) 8

Watts v. *Indiana*, 338 U.S. 49 (1949) 4

White v. *Texas*, 310 U.S. 530 (1940) 7

Withrow v. *Williams*, 507 U.S. 680 (1993) ..... *passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. V amend. ..... *passim*

U.S. Const. VI amend 10

18 U.S.C. § 3501 10

42 U.S.C. § 1983 17

OTHER AUTHORITIES:

ABA Special Comm'n on Criminal Justice in a Free Society, *Criminal Justice in Crisis* (1988) 22

Arthur S. Aubry, Jr. & Rudolph R. Caputo, *Criminal Interrogation* (2d ed. 1972) 15

Liva Baker, Miranda: *Crime, Law and Politics* (1983) 24

Peter Carlson, *You Have the Right to Remain Silent*, WASHINGTON POST, Sept. 13, 1998 20,21,24

Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. REV. 1084 (1996) 27

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996) 8

Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) 19,25,26

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) 27-28,29

Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 1996 19-20,26

Tom C. Clark, *Criminal Justice in America*, 46 TEX. L. REV. 742 (1968) 21

John J. Donohue, III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) 28,29

Charles Fried, *Order and Law* (1990) 22

Tom Gibbons & Jim Casey, *Ed Meese's War on* Miranda *Draws Scant Support*, CHI. SUN-TIMES, Feb. 17, 1987 22

Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662 (1986) 14

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979) 5

Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (1992) 15

Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996) 6,7

Lawrence Herman, *The Supreme Court, The Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733 (1987) 5,7

Fred E. Inbau, *et al.*, *Criminal Interrogation and Confessions* (3d ed. 1986) 15

Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465 (1999) 5,7

Yale Kamisar, *Landmark Ruling's Had No Detrimental Effect*, BOSTON SUNDAY GLOBE, Feb 1, 1987 21-22

Yale Kamisar, *Overturning* Miranda, (Detroit) LEGAL ADVERTISER, Feb. 26, 1987 21

Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996) 16

Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233 (1991) 16

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992) 20,21

Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) ..... *passim*

Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) 17,24

Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 L. & SOC'Y REV. 259 (1996) 20,21

Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) 16

Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda: *Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998) 16,25

Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999) 19

Roger Parloff, Miranda *on the Hot Seat*, NEW YORK TIMES MAGAZINE, Sept. 26, 1999 23

Eduardo Paz-Martinez, *Police Chiefs Defend* Miranda *Decision Against Meese Threats*, BOSTON GLOBE, Feb. 5, 1987 22,23

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996) 27

Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) ..... *passim*

David Simon, *Homicide* (1991)..... 20

60 Minutes (CBS television broadcast, Dec. 5, 1999)..... 18

Jerome Skolnick, *Justice Without Trial* (1996)..... 28

George C. Thomas, III, *Is* Miranda *a Real-World Failure?: A Plea for More (and better) Empirical Evidence,* 43 UCLA L. REV. 821 (1996) 20,24

George C. Thomas, III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996) 24,26

Stephen L. Wasby, *Small Town Police and the Supreme Court* (1976) 22

Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998) 17,18

Paul B. Weston & Kenneth M. Wells, *Criminal Investigation: Basic Perspectives* (2d ed. 1974)..... 20

John H. Wigmore, 8 *Evidence* § 309 (3d ed. 1940)..... 5

James Q. Wilson, *Thinking About Crime* (1975) 27

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Pete Yost, *Police Executive Backs* Miranda *Ruling Review*, WASHINGTON POST Jan. 23, 1987 22

Evelle Younger, *Interrogation of Criminal Defendants*, 35 FORDHAM L. REV. 255 (1966)..... 22

David E. Zulawski & Douglas E. Wicklander, *Practical Aspects of Interview and Interrogation* (1993)..... 15

IN THE

Supreme Court of the United States

No. 99-5525

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with nearly 300,000 members that has been engaged in defense of the Bill of Rights for 80 years.[1] Many of its efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as

---

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of the brief.

amicus curiae in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This brief will concentrate on the legal setting for this Court's decision in *Miranda*, the factual circumstances of custodial interrogations today, and the evidence concerning *Miranda*'s supposed "costs" to law enforcement. That limited focus, however, should not obscure our broader concern. The ACLU continues to believe, as we believed in 1966, that if the Fifth Amendment privilege is to remain an effective guarantor of our accusatorial system of criminal justice, some warning is necessary to assure that persons subjected to custodial interrogation know they are not obliged to respond to questioning by the police and that the police will respect their right to remain silent.

SUMMARY OF ARGUMENT

This Court's landmark decision in *Miranda* v. *Arizona* was a necessary response to the failure of the due process voluntariness test to protect adequately the core values of our accusatorial system of justice, embodied in the Fifth Amendment's prohibition against compelled self-incrimination. The *per se* nature of the holding in *Miranda* was entirely consistent with the law this Court had developed in other contexts to determine whether a particular government action amounted to unlawful compulsion under the Fifth Amendment.

In the past thirty-four years, *Miranda*'s requirements have been crafted into a series of workable rules that fully respect the legitimate needs of law enforcement, and *Miranda* has become perhaps the most widely recognized constitutional protection in our criminal justice system. *Stare decisis* strongly counsels against wholesale changes in these rules "at this late date." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in the judgment). Nor is any such change justified.

Custodial interrogations today involve the same inherent compulsion that they did when *Miranda* was decided. Police manuals and reported cases continue to detail the sometimes illegal lengths to which law enforcement officials will go,

even with the protections of *Miranda*, to get a confession from a suspect. These sources provide a disturbing glimpse of what police practices could become in a world without *Miranda*—where police need not tell citizens of the right to remain silent, and need not respect that right once invoked.

Some contend that warning citizens about their constitutional rights has imposed great "costs" to law enforcement. In fact, the evidence is directly to the contrary—in the vast majority of cases, police are able to conform their practices to the dictates of *Miranda* without difficulty. In the end, *Miranda* has established a system that works, both for police and for the citizens they chose to interrogate.

ARGUMENT

I. THIS COURT'S *MIRANDA* DECISION IS AN APPROPRIATE AND NECESSARY MEANS OF ENFORCING THE FIFTH AMENDMENT

The Fifth Amendment protection against compelled self-incrimination embodies core values of our accusatorial system of criminal justice. The *Miranda* decision was a necessary response to the failure of the due process voluntariness test to adequately protect the privilege or guide courts or the police. *Miranda*'s *per se* requirement was consistent with prior due process voluntariness analysis, which also included some *per se* rules, and with this Court's approach to the distinct question of assessing compulsion under the Fifth Amendment. *Miranda*'s holding, itself a compromise, has resulted in a series of rules that provide understandable and workable guidelines concerning custodial interrogations to courts and police alike.

A. The Fifth Amendment Privilege Against Self-Incrimination Reflects Core Values of Our System of Criminal Justice

Our accusatorial system of justice is based on the absolute right of citizens accused of crime not to confess, but instead to stand silent and put the prosecutor to his proof. The privilege against self-incrimination is the "essential main-

stay" of that accusatorial system of prosecution. *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964).[2] The privilege against self-incrimination protects fundamental notions of personal autonomy by giving citizens suspected of crime the right to choose whether to remain silent or to speak. *See Miranda*, 384 U.S. at 469; *Moran* v. *Burbine*, 475 U.S. 412, 426-27 (1986). By allowing people to choose not to speak with law enforcement, the privilege also reflects respect for personal privacy and individual dignity. *See Couch* v. *United States*, 409 U.S. 322, 327 (1973); *Miranda*, 384 U.S. at 460. Thus, the privilege embodies "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, *free from the possibilities of future legislative change*." *Bram* v. *United States*, 168 U.S. 532, 544 (1897) (emphasis added).

In addition to protecting the accusatorial system of criminal justice, the privilege against self-incrimination plays an important role in protecting against abuses that may too easily taint any custodial interrogation. Custodial interrogation is designed to exploit the weaknesses of suspects, *Miranda*, 384 U.S. at 455, and this Court has found "a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Moran* v. *Burbine*, 475 U.S. at 426 (citation omitted); *see Escobedo* v. *Illinois*, 378 U.S. 478, 489 (1964) ("The exercise of the power to extract answers begets a forgetfulness of the just

---

[2] *See Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (privilege against self-incrimination reflects "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; [and] our preference for an accusatorial rather than an inquisitorial system of criminal justice") (citations and internal quotations omitted); *Watts* v. *Indiana*, 338 U.S. 49, 55 (1949) ("Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system.").

limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture.") (quoting John H. Wigmore, 8 *Evidence* § 309 (3d ed. 1940)); Lawrence Herman, *The Supreme Court, The Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 752 (1987). The privilege against self-incrimination thus protects the reliability of our system of criminal justice. *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966).

Finally, as this Court recently emphasized in *Withrow* v. *Williams*, 507 U.S. 680 (1993), the privilege "safeguards 'a fundamental *trial* right.'" *Id.* at 691 (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). Without adequate protection during custodial interrogation, the privilege against self-incrimination invoked at trial would be an "empty formalit[y]." *Miranda*, 384 U.S. at 466.

B. The Due Process Voluntariness Test was Unworkable and Gave No Guidance to Courts or the Police

It was not until *Miranda* that the Court came to terms with the compulsion inherent in every custodial interrogation. Prior to that, the Court only reviewed statements given in the course of custodial interrogations to determine whether they were voluntary pursuant to the due process clause, an inquiry that focused on whether a statement was a product of the suspect's overborne will. *Miranda* was, in large measure, a reaction to the inability of the due process voluntariness analysis to protect the core values reflected in the Fifth Amendment's prohibition against compelled self-incrimination. These shortcomings have been noted not only by supporters of *Miranda*, *see, e.g.*, Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471-72 (1999), but also by its critics, *see* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (noting "the intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine"). *See Miller* v. *Fenton*, 474 U.S. 104, 114 n. 4 (1985) ("The voluntariness

rubric has been variously condemned as useless, perplexing, and legal double talk.") (internal quotations and citations omitted).

In its many voluntariness decisions prior to *Miranda*, the Court generally applied a "totality of the circumstances" test that gave no guidance to police and produced a welter of unpredictable results. In some cases, the "totality of the circumstances" included examination of the personal characteristics of the suspect in an effort to determine retrospectively whether the particular suspect had the ability to withstand interrogation without "breaking down." *See, e.g., Reck* v. *Pate*, 367 U.S. 433, 441-42 (1961); *Spano* v. *New York*, 360 U.S. 315, 321-22 and n.3 (1959); *Fikes* v. *Alabama*, 352 U.S. 191, 193 (1957). In other cases, the personal characteristics of the defendant were not so much as mentioned, with the analysis focusing on the conduct of the police, including whether the suspect had been allowed to consult with family members, friends, or counsel, or advised of his right to remain silent. *See, e.g., Turner* v. *Pennsylvania*, 338 U.S. 62 (1949); *Harris* v. *South Carolina*, 338 U.S. 68 (1949); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Malinski* v. *New York*, 324 U.S. 401 (1945).

In addition to its "totality of the circumstances" test, the Court also developed, as a matter of due process, a number of disjointed rules that held confessions inadmissible *per se*, regardless of other "circumstances." *See* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996). In the most obvious example, the Court held that a confession that was the product of physical force could not be admitted at trial. The Court explained that where there is "[p]hysical violence or threat of it by the custodian of a prisoner during detention," there "is no need to weigh or measure its effects on the will of the individual suspect," because such confessions are "too untrustworthy to be received as evidence of guilt." *Stein* v. *New York*, 346 U.S. 156, 182 (1953); *see Brown* v. *Mississippi*, 297 U.S. 278

(1936); *White* v. *Texas*, 310 U.S. 530 (1940).[3] The Court also established a *per se* rule that a confession following continuous questioning of the suspect for thirty-six hours without rest or sleep was "so inherently coercive" that the resulting confession had to be excluded without inquiry into the remainder of the circumstances or their actual impact on the particular suspect. *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154 (1944).

It is incorrect, therefore, to contend that prior to *Miranda* there was a single voluntariness test that governed the admissibility of confessions. Instead, during the period between *Brown* v. *Mississippi* and *Miranda*, there was a "cornucopia of Due Process tests." *See* Hancock, *supra*, 70 TUL. L. REV. at 2237. The result was a body of law that gave little to no guidance to police or to lower courts about what practices or "circumstances" this Court would find consistent with due process and what would cross the line. *See* Kamisar, *Confessions, supra,* 34 TULSA L.J. at 471-72; Herman, *The Supreme Court, supra,* 48 OHIO ST. L.J. at 752.

C. In Rejecting a "Totality of the Circumstances" Test, *Miranda* is Consistent With This Court's Traditional Approach to Defining Fifth Amendment Compulsion

It is a common misperception—shared by the court below—that *Miranda*'s *per se* warning requirement represented a "new" analytical approach. *See United States* v. *Dickerson*, 166 F.3d 667, 685 (4th Cir. 1999). The only groundbreaking aspect of *Miranda* was its recognition that, like other governmental actions aimed at eliciting information from unwilling suspects, custodial interrogation raises Fifth

---

[3] Despite this rule, the Court—pursuant to its "totality" caselaw—frequently allowed admission of confessions where there was substantial evidence of physical violence, refusing to consider that evidence unless it was undisputed by the police. *See, e.g., Stein*, 346 U.S. at 169-70; *Crooker* v. *California*, 357 U.S. 433, 437-38 n.3 (1958); *Stroble* v. *California*, 343 U.S. 181, 185-86 (1952).

Amendment issues of compulsion *in addition to* the due process question of voluntariness. Although the "compulsion" that violates the Fifth Amendment has occasionally been equated with the "involuntariness" or "overborne will" that violates due process,[4] the two tests have always been distinct.[5] In analyzing compulsion under the Fifth Amendment, this Court typically has *not* applied a "totality of the circumstances" test. Rather, the Court has held that many governmental actions intended to elicit information from unwilling suspects, or to impose a cost on asserting the privilege, are impermissibly "compelling" *per se*. Thus, *Miranda*'s conclusion that unwarned custodial interrogation involves inherent compulsion fits comfortably within this Court's application of the Fifth Amendment in other contexts, both before *Miranda* and since.

The classic example of impermissible Fifth Amendment compulsion is the threat of a contempt citation. Such a threat has always been treated as compelling *per se*, *see, e.g.*, *Hoffman* v. *United States*, 341 U.S. 479 (1951); *New Jersey*

[4] *See, e.g.*, Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 302 (1996).

[5] The distinction between compelled and coerced statements is fundamental to our system of civil and criminal justice. While coerced statements are never admissible for any purpose, *Mincey* v. *Arizona*, 437 U.S. 385 (1978), witnesses are routinely *compelled* to give statements under subpoena. Absent a valid claim of privilege, such compelled statements are clearly admissible, *Kastigar* v. *United States*, 406 U.S. 441 (1972), and are the bread and butter of virtually all judicial proceedings. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("it is imperative to the function of courts that compulsory process be available"). Indeed, the Sixth Amendment provides the accused with the right to *compulsory* process to call witnesses in his favor; again, those witnesses are compelled to testify absent an applicable privilege. *See Washington* v. *Texas*, 388 U.S. 14 (1967). The *only* such privilege guaranteed by the Constitution is that against compelled self-incrimination, for that privilege goes to the heart of our assurance that people are innocent until a prosecutor proves them guilty.

v. *Portash*, 440 U.S. 450 (1979), even though many witnesses can and do resist this threat and go to jail rather than testify. *See, e.g., United States* v. *Wilson*, 421 U.S. 309 (1975).

A threat to discharge a public employee for failure to testify is also compelling *per se* and therefore impermissible under the Fifth Amendment. *See, e.g., Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968). This Court has never suggested that the totality of circumstances must be assessed in such cases to determine if such a threat "overbears" a particular employee's will depending on his economic circumstances. *See Lefkowitz* v. *Turley*, 414 U.S. 70, 83 (1973) (Fifth Amendment compulsion occurs *per se* when refusal to waive privilege results in disqualification from contracting with public agencies); *accord Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977). Similarly, a comment on a defendant's failure to testify is impermissible *per se* regardless of the "circumstances," because it imposes a cost on assertion of the privilege. *See, e.g., Carter v. Kentucky*, 450 U.S. 288 (1981); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Griffin v. California*, 380 U.S. 609, 614 (1965).[6]

[6] *Miranda*'s requirement that police take affirmative steps to dispel inherent compulsion, by reciting warnings, finds a close parallel in the Fifth Amendment requirement that a trial judge take affirmative steps to warn the jury not to draw an adverse inference from a defendant's failure to testify. This Court noted in *Carter* v. *Kentucky* that "if left to roam at large with only its untutored instincts to guide it," an unwarned jury might draw inferences that would jeopardize the Fifth Amendment privilege. *Carter*, 450 U.S. at 301. But, the Court continued, "[a] trial judge has a powerful tool at his disposal *to protect the constitutional privilege* – the jury instruction – and he has *an affirmative obligation* to use that tool." *Id.* at 303 (emphasis added). *Carter*'s affirmative warning requirement, triggered in the trial setting by a defense counsel's request, is both *per se* and explicitly prophylactic, much like *Miranda*'s affirmative warning requirement triggered by custodial interrogation.

Thus, in holding that custodial interrogation of an unwilling or unwarned suspect involves inherent compulsion, *Miranda* applied to police questioning the same *per se* approach that has been a familiar staple of this Court's Fifth Amendment jurisprudence. Indeed, it is § 3501, not *Miranda*, that departs from the traditional Fifth Amendment concept of compulsion. Section 3501 provides that all incriminating statements "shall be admissible" if found to be "voluntarily made . . . *tak[ing] into consideration all the circumstances*." 18 U.S.C. § 3501(a), (b) (emphasis supplied).[7] The totality-of-circumstances approach that would be mandated by § 3501 is irreconcilable with this Court's conclusion in *Hoffman, Portash, Gardner, Griffin*, and their progeny that certain government action (or inaction, as in *Carter*) involve impermissible compulsion *per se*, without regard to the defendant's particular circumstances.[8]

---

[7] To be sure, *Miranda* recognized that Congress or the States might adopt alternative means of protecting the Fifth Amendment privilege, but made clear that such alternative measures must be "at least as effective [as *Miranda*] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467. Section 3501 does not require that *any* warnings be given and merely returns protection of the Fifth Amendment privilege to the same retrospective "totality" analysis rejected by *Miranda*. *Cf. Smith* v. *Robbins*, No. 98-1037, slip op. at 19 (Jan. 19, 2000) (California procedure for appointed counsel to file brief on behalf of indigent upheld where procedure, while not identical to prophylactic requirements of *Anders* v. *California*, 386 U.S. 738 (1967), "far exceed[s] those procedures that we have found invalid").

[8] Similarly, in the context of Sixth Amendment right-to-counsel and confrontation claims, the § 3501 mandate requiring federal courts to admit all "voluntary" statements would, if upheld, require overruling such cases as *United States* v. *Henry*, 447 U.S. 264 (1980), *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Massiah* v. *United States*, 377 U.S. 201 (1964), and by implication such parallel state cases as *Gray* v. *Maryland*, 523 U.S. 185 (1998), *Cruz* v. *New York*, 481 U.S. 186 (1987), and *Brewer* v. *Williams*, 430 U.S. 387 (1977).

D. *Miranda's* Workable Rules Have Become Part of Our Constitutional Heritage and Should Not Be Cut Back

The *Miranda* decision was a compromise. This Court could have held that any statement made in the course of custodial interrogation by the police was inadmissible; or it could have adopted a rule consistent with the position then advocated by this *amicus* that the presence of a lawyer was necessary at custodial interrogations to protect adequately a suspect's Fifth Amendment rights. *See Moran* v. *Burbine*, 475 U.S. at 426. Instead, this Court held that warnings given by the police were adequate to dispel the compulsion inherent in custodial interrogations.

The requirements of *Miranda* are particularly crafted to protect the privilege. *Miranda* requires that the suspect be warned of his rights, not only to inform the suspect so he may make an intelligent and informed choice as to whether to invoke the privilege or waive his rights,[9] but also to "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Miranda*, 384 U.S. at 436; *see Minnesota* v. *Murphy*, 465 U.S. 420, 433 (1984) ("the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained."). *Miranda* also requires that once the suspect invokes his right to remain silent or to have an attorney present, the interrogation must cease. *Miranda*, 384 U.S. at 473-74. In this way the suspect can exercise some degree of control over the duration of the interrogation and the subjects

---

[9] Requiring warnings before the Fifth Amendment privilege may be waived is necessary because the privilege protects the basic right to a trial, as well as the reliability of the truth-finding process. *See Withrow*, 507 U.S. at 691. Accordingly, because the Fifth Amendment privilege against self-incrimination "is a fundamental trial right," it "operates in a different manner" than the Fourth Amendment. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *accord Schneckloth* v. *Bustamonte*, 412 U.S. 218, 232, 240 (1973).

discussed. *See Michigan* v. *Mosley*, 423 U.S. 96, 104 (1975). Finally, *Miranda* requires a clear waiver of rights by the suspect before a statement will be admissible. *Miranda*, 384 U.S. at 475-76. This requirement again protects the right of the suspect to make an affirmative choice as to whether to speak or remain silent. The burden of proving a valid waiver is on the State because the isolated circumstances of custodial interrogation are its creation, and the State itself has the "only means of making available corroborated evidence of warnings." *Id.* at 475.

Miranda thus represents a "carefully drawn approach." *Moran* v. *Burbine*, 475 U.S. at 427. As this Court has recognized, a "principal advantage" of the rules announced in *Miranda* is their "ease and clarity of application." *Id.* at 425 (citations omitted). *Miranda*'s requirements have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979). Furthermore, in the thirty-four years since *Miranda*, this Court has amplified and clarified its rules to provide workable guidance on the limits of custodial interrogation. On the one hand, this Court has applied *Miranda* narrowly in a range of circumstances in recognition of law enforcement needs.[10] On the other hand, *Miranda* has been applied more broadly to protect suspects who request counsel during a custodial interrogation. *See Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990).

The success of *Miranda*'s requirements lies not only in their clarity. *Miranda* represents perhaps the most widely recognized constitutional safeguard in our criminal justice

[10] *See, e.g., Michigan* v. *Tucker*, 417 U.S. 433 (1974); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *New York* v. *Quarles*, 467 U.S. 649 (1984); *Oregon* v. *Elstad*, 470 U.S. 298 (1985).

system.[11] A generation of Americans has grown up since 1966 confident that if brought to the police station for questioning, we have the right to remain silent, that the police will warn us of that right and, above all, that they will respect its exercise. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 671-72 (1996). This is not to suggest that longstanding constitutional rules are beyond re-examination, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), but only to suggest that this Court has always acted with appropriate hesitancy before overruling "watershed decision[s]" designed to protect individual rights. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 867 (1992). To measure the public's reliance on *Miranda* may be impossible, but that does not make it irrelevant. To paraphrase *Casey*, "[t]he Constitution serves human values, and while the effect of reliance on [*Miranda*] cannot be exactly measured, neither can the certain cost of overruling [*Miranda*]" for people who have come to view it

[11] As more fully explained in the briefs for petitioner and the United States, there can be no doubt that the *Miranda* Court's requirement of minimum warnings in custodial interrogations was based on constitutional grounds. All nine Justices participating in *Miranda* understood that the Court's ruling stemmed from the requirements of the Constitution. *See Miranda*, 384 U.S. at 490-91 ("the issues presented are of *constitutional dimensions* . . . . Where *rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them*.") (emphasis added); *id.* at 500 (Clark, J., concurring in part and dissenting in part) (emphasis added) (observing that the Court had "fashion[ed] a *constitutional* rule"); *id.* at 505 (Harlan, J., dissenting); *id.* at 532 (White, J., dissenting). In addition, the application of *Miranda* to the States—both on direct appeal and on habeas review—demonstrates that this Court has understood its warning requirements to be of constitutional stature. *See id.* at 491-94, 497-99; *Withrow*, 507 U.S. 680. The tainted fruits holdings of *Oregon* v. *Elstad*, 470 U.S. 298, and *Michigan* v. *Tucker*, 417 U.S. 433, and the public safety exception of *New York* v. *Quarles*, 467 U.S. 649, while imposing limits on the scope of *Miranda*'s applicability, cannot support the sweeping conclusion that *Miranda*'s warning requirement was without constitutional foundation.

as an unquestioned part of our constitutional heritage. *Id.* at 856. Thus, even if the question were closer than we believe it is, *stare decisis* weighs heavily in favor of retaining *Miranda*.

II. CUSTODIAL INTERROGATIONS ARE AS INHERENTLY COMPELLING TODAY AS THEY WERE WHEN *MIRANDA* WAS DECIDED

The decision in *Miranda* was based in large part on what the Court concluded was the compulsion inherent in all custodial interrogations. In the more than thirty years since, studies have confirmed that conclusion. Moreover, police manuals and case law of the kind relied on in *Miranda* continue to reveal a police force that, while better guided in the contours of suspects' Fifth Amendment rights, remains willing to go to questionable and in many cases unlawful lengths to obtain confessions.

A. More Than Thirty Years After *Miranda*, the "Interrogation Room" Remains an Inherently Compelling Environment

Central to this Court's decision in *Miranda* was its conclusion that the very fact of custodial interrogation involves inherent compulsion, *Miranda*, 384 U.S. at 467, a view shared even by *Miranda*'s critics. *See* Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 674 (1986) ("The 'inherent compulsion' of custodial interrogation would be present if an untrained, uniformed officer questioned the suspect in the stationhouse receiving room."); *see also Ashcraft* v. *Tennessee*, 322 U.S. at 161 ("[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional") (Jackson, J., dissenting).

According to the *Miranda* Court, several aspects of custodial interrogation coincide effectively to compel statements from suspects against their will. Custodial interrogations are done in private, secretively, with the police holding the suspect "incommunicado" until a confession is made.

Miranda, 384 U.S. at 448-50. In addition, the "patience and perseverance" of the interrogators can result in "relentless questioning." *Id.* at 450-55. These essential attributes of custodial interrogation remain as inherently compelling today as they were in 1966, "exa:t[ing] a heavy toll on individual liberty and trad[ing] on the weakness of individuals." *Id.* at 455.

The essence of the interrogation room is still dominance and control, exerted first through isolation. As the late Fred E. Inbau, author of the leading treatise on police interrogations, still put it twenty years after *Miranda*, the "principal psychological factor contributing to a successful interrogation is privacy." Fred E. Inbau, *et al., Criminal Interrogation and Confessions* 24 (3d ed. 1986).[12] *See* Arthur S. Aubry, Jr. & Rudolph R. Caputo, *Criminal Interrogation* 199 (2d ed. 1972) (emphasis added) ("Privacy serves the useful purpose of helping to withdraw the environment from the suspect, and in helping create and heighten the illusion that the *suspect is now, and will continue to be, completely on his own resources* after he has entered the interrogation area."). Denials of guilt are simply put aside or even prevented to avoid distracting the interrogator from the objective of obtaining a confession. *See, e.g.*, Inbau, *Criminal Interrogation, supra,* at 142 (recommending that interrogators prevent suspects from making denials); David E. Zulawski & Douglas E. Wicklander, *Practical Aspects of Interview and Interrogation* 227-42 (1993) (providing several methods for preventing suspects from expressing denials of guilt).

Several psychological studies conducted since 1966 have confirmed that the tactics still endorsed in the interrogation manuals tend to promote false or untrustworthy confessions

---

[12] *See Miranda*, 384 U.S. at 449 (quoting this language from the first edition of Inbau's treatise). Until his death in 1998, Inbau continued to enjoy the reputation as the foremost authority on police interrogation techniques. *See, e.g.*, Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 31 (1992).

by implanting notions of guilt or implying leniency. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126-27 (1996); Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 236-41 (1991); *see also* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (in a review of 60 post-*Miranda* confessions, 34 cases of "proven" false confessions, 18 "highly probable" false confessions, and 8 "probable" false confessions). Even drawing from the estimates of Professor Paul Cassell, in the years 1966 to 1998, "somewhere between 320 and 12,608 individuals have been wrongly convicted from false confessions alone." Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda: *Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 562 n. 24 (1998). The tendencies toward false confessions through standard interrogation practices that these studies present—while alarming enough in themselves—only serve to emphasize the atmosphere of inherent compulsion that continues to characterize custodial interro gations today.

B. Police Willingness to Interrogate In Violation of *Miranda* Underscores the Continuing Importance of *Miranda* to Protect Suspects' Rights

Perhaps the most troubling trend in the interrogation room of today is the growing police practice of ignoring *Miranda* altogether. In *Oregon* v. *Hass*, 420 U.S. 714 (1975), Justice Brennan warned that allowing use of unwarned statements for impeachment would send police the message that they were free to violate suspects' Constitutional rights in pursuit of confessions. *Id.* at 725 (Brennan, J., dissenting). The Court dismissed this suggestion as merely a "speculative possibility," *id.* at 723, but today, that "speculative possibility" has become a distinct reality.

Cases from thirty-eight states provide instances of police deliberately ignoring suspects' invocations of silence or right to counsel in attempts to obtain confessions. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 137-38 & n.152 (1998).[13] In one recent empirical study, police continued to question suspects despite the suspects' invocation of their right to silence or to consult with an attorney in nearly one out of every five cases in which suspects invoked these rights. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275-76 (1996). These cases illustrate that in custodial interrogations today, interrogators can and do intentionally violate suspects' rights to obtain confessions, even when they know the resulting confession cannot be used in the prosecutor's case in chief.

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (*en banc*), provides a stark example. In that case, brought under 42 U.S.C. § 1983, law enforcement authorities had followed a "preexisting interrogation plan" whereby they systematically "ignored Cooper's repeated requests to speak with an attorney, deliberately infringed on his Constitutional right to remain silent, and relentlessly interrogated him in an attempt to extract a confession." 963 F.2d at 1223.[14] Following their

---

[13] Not only do police routinely ignore requests for counsel or invocations of silence, but courts also routinely admit the confessions so obtained as "voluntary" under the traditional due process test. *See, e.g., People* v. *Peevy*, 953 P.2d 1212, 1219 (Cal.), *cert. denied*, 119 S. Ct. 595 (1998); *People* v. *Winsett*, 606 N.E.2d 1186 (Ill. 1992), *cert. denied*, 510 U.S. 831 (1993); *People* v. *Bradford*, 929 P.2d 544 (Cal. 1997); *State v. Favero*, 331 N.W.2d 259, 261, 263 (Neb. 1983).

[14] The police agencies in question had assembled a "Task Force" to find a suspect. The Task Force's plan was "to hold the suspect incommunicado, and to pressure and interrogate him until he confessed," including lying to the suspect about the evidence against him and ignoring any request for counsel or right to silence:

> Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in

plan of deliberately ignoring Cooper's repeated requests for counsel, the police interrogators questioned Cooper for four hours regarding, among other things, his Jewish upbringing and his sexual relations with his wife. *Id.* at 1229-31. "With his requests to see a lawyer disregarded, Cooper was a prisoner in a totalitarian nightmare, where the police no longer obeyed the Constitution, but instead followed their own judgment, treating suspects according to their whims." *Id.* at 1243. Cooper was later cleared of all suspicion in the matter. *Id.* at 1234.

This practice of questioning "outside *Miranda*," *i.e.,* in deliberate violation of a suspect's request for counsel or invocation of silence, is far from rare. To the contrary, it has become an institutionalized feature of several major police departments. *See California Attorneys for Criminal Justice* v. *Butts*, 195 F.3d 1039 (9th Cir. 1999). The training manuals and videotapes at issue in the *California Attorneys* case—which feature a California deputy district attorney recommending that police officers deliberately ignore requests for counsel or invocation of the right to silence—received statewide distribution and were followed elsewhere. *See* Weisselberg, *supra*, 84 CORNELL L. REV. at 136-37.

In a world "without *Miranda*," with an after-the-fact determination of voluntariness as the only guide, the state of police interrogation would be very much worse indeed. As the former chief of several major metropolitan police departments has said, "I know cops. And one of the things I know about cops is you have to control them. If you don't control them, they will go out of control . . . And *Miranda* is one of those controls that keeps them in line." *60 Minutes* (CBS television broadcast, Dec. 5, 1999) (William Bratton,

---

chief, they hoped it would be admissible for purposes of impeachment if the suspect ever went to trial. They expected that the confession would prevent the suspect from testifying he was innocent, and that it would hinder any possible insanity defense.

Cooper, 963 F.2d at 1224.

spokesperson for the National Fraternal Order of Police); *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999) (describing what interrogation practices might look like in a world "without *Miranda.*") Without *Miranda*, the police would lack the guidance or boundaries necessary to protect the Fifth Amendment privilege against such abuses.

III. THE *MIRANDA* REQUIREMENTS DO NOT SIGNIFICANTLY BURDEN LAW ENFORCEMENT

Not only does *Miranda* work to guard against compulsion in the interrogation room, but over thirty years of accumulated evidence and the direct experience of police professionals confirms that it does so without significantly burdening law enforcement. A substantial number of police chiefs and prosecutors agree that the *Miranda* requirements are beneficial, not burdensome. In addition, the empirical data are clear and, with the exception of conclusions by Professor Cassell, strikingly consistent in finding no net cost to law enforcement attributable to *Miranda*.[15] Before addressing empirical details, we note that the prevailing judgment about *Miranda*'s beneficial effect is not as surprising as might at first appear. *Miranda*'s impact must be assessed as a *net* result of its "costs" and its offsetting gains for law enforcement.

In hundreds of thousands of custodial interrogations each year,[16] *Miranda helps* police in two ways. It makes clear

---

[15] Even Professor Cassell has conceded that "warnings [the only *Miranda* requirement allegedly violated in this case] can be given to suspects without significantly harming the confession rate." Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment,* 90 NW. U. L. REV. 387, 494 (1996).

[16] Police annually make over 750,000 arrests for violent crime and over two million arrests for property crime. *Id.* at 440. Roughly 80% of these arrestees are questioned. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical*

what an officer must do to protect a suspect's rights and thereby to ensure that his statement will be admissible. *See Michigan* v. *Tucker*, 417 U.S. at 433. In addition, *Miranda* warnings tend to put suspects at ease by promoting confidence that their right to cut off questioning will protect them from having to make incriminating statements. Studies consistently show that because of *Miranda*, and public awareness that courts will enforce it, suspects tend to be less wary, let down their guard and then make damaging admissions.[17] Interrogators have learned that *Miranda* often produces confessions that they would not otherwise obtain.[18]

Moreover, to focus only on elusive possibilities of change in the *number* of confessions obscures the more important and universally acknowledged *qualitative* changes attributable to *Miranda*.[19] These include not only enhanced protection for suspects and enhanced legitimacy for police but also enhanced reliability of the confessions themselves. *Miranda* has altered interrogation techniques, discouraged tacit

---

Study of the Effects of Miranda, 43 UCLA L. REV. 839, 854 (1996).

[17] *See* David Simon, *Homicide* 197-202 (1991); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992); Peter Carlson, *You Have the Right to Remain Silent*, WASHINGTON POST, Sept. 13, 1998, at 6.

[18] Carlson, *supra* at 11, 19; Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 L. & SOC'Y REV. 259 (1996); *cf.* George C. Thomas, III, *Is* Miranda *a Real-World Failure?: A Plea for More (and better) Empirical Evidence*, 43 UCLA L. REV. 821, 831 (1996).

[19] In fact, even authors otherwise opposed to *Miranda* have praised it for helping to "dignify" police practices and to improve the credibility of confessions obtained by interrogation. *See, e.g.*, Paul B. Weston & Kenneth M. Wells, *Criminal Investigation: Basic Perspectives*, 184 (2d ed. 1974). At least one commentator has warned that removing this bar would send a dangerous message to the law enforcement community. *See* Leo, *The Impact of* Miranda, *supra*, 86 J. CRIM. L. & CRIMINOLOGY at 680.

intimidation, and forced interrogators to work from a suspect's overconfidence and misplaced trust.[20] There can be little doubt that confessions elicited in this manner are more reliable than those prompted by fear.

These offsetting tendencies help explain why *Miranda*'s requirements cause little or no *net* loss of confessions.

A. Police and Prosecutors Widely Believe That *Miranda* Does Not Burden Law Enforcement

Law enforcement officials widely share the perception that *Miranda* does not hinder, and in fact benefits, the police. Though many officials would prefer to escape *Miranda*'s constraints, many others acknowledge that *Miranda* is not burdensome. Justice Clark, a former Attorney General, and Justice White, a former Deputy Attorney General, both dissented in *Miranda* but later supported the decision,[21] as did Chief Justice Burger. *See Rhode Island* v. *Innis*, 446 U.S. at 304 (Burger, C.J., concurring in the judgment). Leading police chiefs and prosecutors who initially opposed *Miranda* likewise changed their position,[22] and wider surveys confirm law enforcement support for *Miranda*.[23]

---

[20] *See, e.g.*, Carlson, *supra;* Leo, *From Coercion to Deception, supra;* Leo, Miranda's *Revenge, supra.*

[21] Justice Clark reported in 1968 that confessions were "still going stronger than ever," and stated, "I confess error in my appraisal of [*Miranda*'s] effect." Tom C. Clark, *Criminal Justice in America*, 46 TEX. L. REV. 742, 744-45 (1968). Justice White acknowledged "the coercion inherent in custodial interrogation," *Minnesota* v. *Murphy*, 465 U.S. at 433, and joined this Court in holding that *Miranda* claims must remain enforceable in the context of *habeas corpus*. *Withrow*, 507 U.S. 680.

[22] Pittsburgh's Chief of Police "became convinced that his officers were doing better work as a result of *Miranda*." *See* Yale Kamisar, *Overturning Miranda*, (Detroit) LEGAL ADVERTISER, Feb. 26, 1987, at 4. Los Angeles District Attorney Evelle Younger and Philadelphia District Attorney Arlen Specter, both prominent critics of *Miranda*, later endorsed it, with Specter stating that "law enforcement has become accommodated to *Miranda*, and therefore

When a division of the Department of Justice suggested challenging *Miranda* in 1986, Solicitor General Charles Fried noted that "[m]ost experienced federal prosecutors in and out of my office were opposed to this project, as was I." Charles Fried, *Order and Law* 46 (1990). A survey conducted for the Department revealed similar sentiment among police executives,[24] and other reports at the time showed emphatic support for *Miranda* among police chiefs and line officers alike.[25] This view remains widely held. William Bratton, who has headed five police departments including

---

I see no reason to turn the clock back." Quoted in Yale Kamisar, *Landmark Ruling's Had No Detrimental Effect*, BOSTON SUNDAY GLOBE, Feb. 1, 1987, at A27; Evelle Younger, *Interrogation of Criminal Defendants*, 35 FORDHAM L. REV. 255 (1966).

[23] A 1976 survey of 67 police chiefs, sheriffs, and state police commanders also found an "overwhelming" number (more than 90% in one state) favorable to *Miranda*. Stephen L. Wasby, *Small Town Police and the Supreme Court* (1976). A 1988 American Bar Association survey of more than 800 prosecutors, judges, and police officers found that "[a] very strong majority . . . agree that compliance with *Miranda* does not present serious problems for law enforcement." ABA Special Comm'n on Criminal Justice in a Free Society, *Criminal Justice in Crisis* 28 (1988).

[24] *See* Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 507 n.23 (1996) (76% of those polled opposed any modification of *Miranda* or "prefer[red] modification to reversal;" only 24% supported overruling of *Miranda)*.

[25] Tom Gibbons & Jim Casey, *Ed Meese's War on* Miranda *Draws Scant Support*, CHI. SUN-TIMES, Feb. 17, 1987, at 41; Eduardo Paz-Martinez, *Police Chiefs Defend* Miranda *Decision Against Meese Threats*, BOSTON GLOBE, Feb. 5, 1987, at 25-29. The Executive Director of the International Association of Chiefs of Police, one of the few police leaders to voice support for reconsideration at that time, stated that *Miranda* "could be set aside, *provided there are appropriate guidelines that deal very stringently with police officers that abuse them.*" Pete Yost, *Police Executive Backs* Miranda *Ruling Review*, WASHINGTON POST, Jan. 23, 1987, at A17.

New York's, states that *Miranda* "works fine" and is "an effective control on abuses." Roger Parloff, Miranda *on the Hot Seat*, NEW YORK TIMES MAGAZINE, Sept. 26, 1999, pp. 84, 87.

Police support for *Miranda* suggests that many chiefs would impose similar requirements even if *Miranda* were overruled. Nonetheless, police officials widely endorse *federal* enforcement, in order to insure that warning and waiver requirements remain effective.[26] Moreover, a decision ending *Miranda*'s constitutional status in our national culture would undermine suspects' confidence that their rights will be respected in interrogations. Respect for *Miranda*'s requirements "is sustained in no small part by the existence of [federal] review." *Withrow*, 507 U.S. at 695.

Notwithstanding this background of widespread support by the law enforcement community, the existing state of custodial interrogation and the significant number of officials urging this Court to affirm the result below leave little doubt that freedom to depart from *Miranda* would not go unused. The resulting local variations would quickly erode public confidence that clear-cut safeguards still apply. Even in communities that adopted *Miranda*-like rules voluntarily, the absence of a constitutional imprimatur would undercut the public awareness, legitimacy and trust that *Miranda*'s nationwide acceptance now confers. Leo, *The Impact of* Miranda, *supra,* 86 J. CRIM. L. & CRIMINOLOGY at 679-80.

B. Data Confirm That *Miranda* Does Not Impede Law Enforcement.

In the wake of *Miranda*, many studies attempted to assess its effect. Though crude, the studies generally pointed in the same direction—with isolated exceptions, *Miranda*'s initial

---

[26] One chief warned that even if communities imposed similar requirements on their own, individual officers would "probably exercise their own judgment" and "then you're going to have a mixture of a lot of things happening." Paz-Martinez, *Police Chiefs*, *supra*, at 29.

impact on confession and conviction rates appeared small or non-existent.[27] Two 1996 studies provide contemporary data. In the first, covering three California cities, police obtained incriminating statements in 64% of their interrogations.[28] In Salt Lake City, incriminating statements were obtained in 54% of the interrogations.[29] Both rates were well within the range reported in various cities prior to *Miranda*.[30] In a 1998 report on Washington, D.C., the interrogation success rate, though not quantified, was so high that *Miranda*'s impact was described as "approximately zilch."[31]

Scholars are virtually unanimous in noting the absence of empirical evidence that *Miranda* impedes law enforcement.[32] And nearly all scholars concur in dismissing the contrary

---

[27] *See* Liva Baker, Miranda: *Crime, Law and Politics*, 180-81, 403-05 (1983); Leo, *The Impact of* Miranda, *supra*, 86 J. CRIM. L. & CRIMINOLOGY at 632-45. In the cautious language of social science, "[t]here is insufficient evidence that *Miranda* has a statistically significant effect on the percentage of suspects who incriminate themselves." Thomas, *Is* Miranda *a Real-World Failure?*, *supra*, 43 UCLA L. REV. at 830-31.

[28] Leo, *Inside the Interrogation Room*, *supra*, 86 J. CRIM. L. & CRIMINOLOGY at 280.

[29] *See* George C. Thomas, III, *Plain Talk About the* Miranda *Empirical Debate; A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 935-36, 952 (1996).

[30] *Id.*, at 953, 955; Schulhofer, Miranda's *Practical Effects*, *supra*, 90 NW. U. L. REV. at 509 n.28.

[31] Carlson, *supra*, at 9.

[32] The principal scholarly disagreement is on the subtle question whether the data affirmatively show that *Miranda* causes no harm or merely *fail to show* that *Miranda does* cause harm. And even the more cautious scholars concede that an *absence* of evidence is telling: "Reaching any decision on the status of *Miranda* without better empirical evidence is roughly like having to decide whether you need surgery before knowing whether you are sick." Thomas, *Plain Talk*, *supra*, 43 UCLA L. REV. at 958.

claims of Professor Cassell, whose arguments we now consider.

C. Professor Cassell's Empirical Claims About *Miranda*'s "Costs" Do Not Withstand Scrutiny

In his effort to demonstrate that *Miranda* impedes law enforcement, Professor Cassell has used four kinds of data: before-and-after studies of *Miranda*'s initial impact, data from contemporary interrogation in Salt Lake City, the trend of clearance rates for four years after *Miranda*, and a regression analysis of clearance rates over a more extended period. Several of Cassell's studies have drawn unusually sharp criticism for their failure to meet standard scholarly norms. *See, e.g.*, Leo, *Using the Innocent to Scapegoat* Miranda, *supra*, 88 J. CRIM. L. & CRIMINOLOGY at 557 n.2 (1998). Each study by Cassell suffers from major defects that render its claims untenable.

Cassell's first set of data examined eleven prior studies comparing confession rates immediately before and after *Miranda*. He excluded three studies that he deemed flawed; in the remainder, confessions were said to drop on average by 16%, and convictions by an estimated 3.8%. Cassell, Miranda's *Social Costs*, *supra*, 90 NW. U. L. REV. at 437-38. As these were crude studies from a period before police had adapted to *Miranda*, the claimed 3.8% decline in conviction rates is not necessarily alarming. Yet examination of Cassell's procedures showed that inconsistent methods and misreading of sources had significantly inflated the claimed drop in confessions,[33] and had even inflated the case attrition

---

[33] Schulhofer, Miranda's *Practical Effect*, *supra*, 90 NW. U. L. REV. at 502, 538-39. For illustration, we mention one of the many flaws in this study. Cassell included in his averages substantial confession-rate drops reported in Brooklyn and New Orleans, though in both cases the confession rate in the "before" period was not determined from an actual count but solely from the subjective estimate of an official critical of *Miranda*. *Id.* at 531-33. Yet, inconsistently, Cassell excluded a Los Angeles study finding that confessions had *increased* by 10%, doing so on the basis of strained speculation that there *might* have been a difference in the

rate to the 3.8% level; on reanalysis, the properly adjusted case attrition rate was less than 1%,[34] with reason to think the net impact would be even less today.[35]

Cassell's second study examined contemporary interrogation in Salt Lake City. Cassell reported that only 42% of interrogated suspects gave incriminating statements, compared to pre-*Miranda* figures for other cities that he put in the 55-60% range.[36] Reanalysis of the data showed that Cassell had excluded confessions he deemed "volunteered" and useful statements in the form of incriminating "denials with explanation." When these were included, as any valid comparison to pre-*Miranda* figures requires, the adjusted confession rate (54%) was indistinguishable from Cassell's pre-*Miranda* comparison figure (55-60%). Thomas, *Plain Talk, supra,* 43 UCLA L. REV. at 935-36, 946-52, 953. In earlier work, moreover, Cassell reported that pre-*Miranda* confession rates varied over a much wider range (31%-88%), with eleven of the twenty cities below 50%. *See id.* at 936; Cassell, Miranda's *Social Costs, supra,* 90 NW. U. L. REV. at 459. Cassell's own figure for Salt Lake City (42%) falls well within the wider pre-*Miranda* range, and the properly adjusted figure (54%) is above the median of the pre-*Miranda* reports. The Salt Lake City data offer no reason to think that

---

kinds of confessions counted before and after. *Id.* If such a discrepancy might have affected the Los Angeles study, an actual count, there is at least equal reason for concern about inaccuracy in the before-period "guestimates" that Cassell deemed reliable in the Brooklyn and New Orleans cases. Other similarly serious flaws further skew the conclusions of Cassell's before-and-after study. *See, e.g., id.* at 516-30.

[34] *Id.* at 539, 544-47. Among the usable studies, change in confession rates varied widely, from a 16% decrease to a 10% increase. *Id.* at 539. Such diverse results suggest that *Miranda* itself probably did not cause the fluctuations.

[35] *Id.* at 507-10, 546-47.

[36] Cassell & Hayman, *Police Interrogation, supra,* 43 UCLA L. REV. at 871-72.

interrogation is less successful today than it was before *Miranda.*

Cassell's third set of data shows that clearance rates (the percentage of reported crime that police solve by arrest) remained at about 60% from 1950-1965, but dropped steadily during the four years following *Miranda,* and then leveled off at about 45% thereafter. Cassell suggests that no other event, only *Miranda,* could explain this mid-1960's drop in clearance rates. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders,* 90 NW. U. L. REV. 1084, 1089-91 (1996). But when the clearance-rate trend is compared to the trend in police clearance *capacity* (the number of officers available relative to the number of crimes to be solved), the two trends closely match.[37] Crime rates had been skyrocketing since 1960, largely for social and demographic reasons. *See* James Q. Wilson, *Thinking About Crime* 4-20 (1975). Because police resources failed to keep up, the number of officers per 100 violent crimes fell sharply, from 115 in 1960 and 82 in 1965 to only 45 in 1970. *See,* Schulhofer, *Clearance Rates, supra,* 91 NW. U. L. REV. at 284, 285 n.16. Given the collapse of investigative capacity during this period, the predictable drop in clearance rates provides no reason to think that *Miranda* made police less efficient. In fact, the number of crimes cleared *per officer* steadily *rose* during this period. *Id.* at 286-87.

Cassell's fourth study used regression analysis to test whether clearance rates were higher before *Miranda* (1950-65) than after (1966-94). Controlling for all *quantifiable* variables, the study asserted that *Miranda* reduced clearance rates for property crimes, robbery and total violent crimes, but not for murder, rape and assault. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforce-*

---

[37] *See* Stephen J. Schulhofer, Miranda *and Clearance Rates,* 91 NW. U. L. REV. 278, 283-84 (1996).

ment, 50 STAN L. REV. 1055, 1086-88 (1998).[38] A reanalysis with different statistical models confirmed only some of Cassell's results.[39]

Whichever the preferred model, there is no basis for Cassell's speculative claim that *Miranda* was the likely cause of any statistical differences between the 1950-65 and 1966-94 periods. A host of other factors could explain the results, including defects in the data and the many *non*quantifiable factors that differed in the two periods.[40] Potential causes *not* controlled in his study include social changes that make crime harder to solve (*e.g.,* the increasing proportion of stranger crimes), legal changes unrelated to *Miranda* (*e.g.*, implementation of the right to counsel, more widespread compliance with the Fourth Amendment), and changes in police organization, including more objective crime-recording practices. Given vast changes in society and law enforcement between 1950-65 and 1966-94, there is no reason to assume that *Miranda* must have caused the clearance-rate drop or any part of it.[41]

---

[38] It should be noted that the variable labeled "MIRANDA" throughout this article is merely a before-after "dummy" variable centered on 1966, *not* necessarily a measure of *Miranda's* causal effect. *See* John J. Donohue, III, *Did* Miranda *Diminish Police Effectiveness?,* 50 STAN. L. REV. 1147, 1161, 1163, 1172 (1998).

[39] *See,* Donohue, *Did* Miranda *Diminish, supra,* 50 STAN. L. REV. at 1168-70, finding a significant difference for larceny but not for other property crimes, and for total violent crimes, but not for the individual crimes that comprise this category (murder, rape, robbery and assault).

[40] *Id.* at 1151-56.

[41] One particularly important factor makes clear why it is so speculative to attribute clearance-rate differences to *Miranda.* It is well-established that during the 1950-65 period, many police departments artificially inflated their clearance rates, for both internal and public-relations purposes. *See* Jerome Skolnick *Justice Without Trial* 164-81 (1966). More professional record-keeping standards introduced in the late 1960s unquestionably reduced *reported* clearance rates, not because fewer crimes were

Cassell argues that such factors could not have been important because none of them changed dramatically right after *Miranda,* as clearance rates did. Cassell & Fowles, *Handcuffing the Cops, supra,* 50 STAN. L. REV. at 1108, 1113, 1117. There are two large flaws in this response. First, major record-keeping improvements were introduced in the late 1960s, so their principal effect could well have occurred in that period. Donohue, *Did* Miranda *Diminish, supra,* 50 STAN L. REV. at 1172 n.100. Second, as discussed above, a precipitous decline in clearance *capacity* also occurred in the late 1960s, in a pattern that fits the clearance-rate drop. Cassell's regression analysis controls for this factor, but only by measuring an *average* clearance-rate effect over the entire 1966-94 period. The differences identified by that analysis could have been caused by any of the many social and legal factors that were different *on average* during the 1966-94 period than they were before, even if those factors did not change abruptly right after 1966.[42] On examination, the regression analysis, like the other Cassell studies, provides no evidence that *Miranda,* on balance, caused a net harmful effect.

At bottom, of course, any potential "cost" to law enforcement due to enforcement of the Fifth Amendment through *Miranda* is beside the point; the Fifth Amendment was unquestionably *intended* to restrain law enforcement. Given the reliance by counsel supporting the decision below on such claims of law enforcement "costs," however, this Court should have an accurate view of what those costs are. There

---

solved but because bogus clearance claims common before were no longer included. Donohue, *Did* Miranda *Diminish, supra,* 50 STAN. L. REV. at 1152-55, 1172.

[42] *Id.* at 1172 n.100. Professor Donohue concludes that "one is left with unbridgeable uncertainty about how much confidence to repose in any of the statistical results" and that even if there were a statistical change in clearance rates, "causal attribution to *Miranda* is difficult in light of the vast systemic changes both in crime and criminal justice that were occurring and have persisted since the mid-1960s." *Id.* at 1172.

is no reason to question the widely held view that *Miranda* does not significantly burden law enforcement.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed.

Respectfully submitted,

STEVEN R. SHAPIRO
VIVIAN BERGER
SUSAN N. HERMAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

STEPHEN SCHULHOFER
1111 East 60th Street
Chicago, IL 60637

JONATHAN L. ABRAM*
AUDREY J. ANDERSON
STEPHEN M. KUPERBERG
HOGAN & HARTSON L.L.P
555 Thirteenth Street, N.W.
Washington, D.C. 20005-1109
(202) 637-5681

* Counsel of Record

Counsel for Amicus Curiae

Mar 6 2000

Supreme Court, U.S.
FILED
MAR 6 2000
CLERK

No. 99-5525

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the Fourth Circuit Court of Appeals

BRIEF OF *AMICUS CURIAE* URGING AFFIRMANCE OF THE FOURTH CIRCUIT DECISION

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of the Constitution, at
Patrick Henry College
P.O Box 1776
Purcellville, VA 20134
(540) 338-1776
* *Counsel of Record*

BEST AVAILABLE COPY

32pp

QUESTION PRESENTED

The trial court found that Charles Dickerson voluntarily confessed to a series of bank robberies after he was taken into custody and before he was read his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). 18 U.S.C. § 3501 permits voluntary confessions to be used in a criminal case in federal court, whether or not the defendant was read his rights.

Are the *Miranda* warnings actually compelled by the Constitution or are they judicially-created rules that can be overruled by a valid Act of Congress?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Authorities v

Summary of Argument 3

Argument: The Fifth Amendment Was Intended to Protect Recognized Rights from Federal Abuse, Not to Create New Rights 5

A. The Legislative Power of the Federal Judiciary 5

1. Separation of Powers 5

2. The Judiciary Has Its Own Legislative Power 6

3. Congress Can Overrule the Legislative Power of the Judiciary 7

4. Overruling the "Unnecessary Delay" Cases 8

B. The Original Intention of the Fifth Amendment 9

1. A Patriotic Zeal for Common Law Liberties 9

2. The Inexhaustible Common Law 10

3. The Anti-Federalists Feared Congress's "Exclusive Power of Legislation" in the New Federal District 12

4. Proposed Solutions 14

C. The Privilege Against Self-Incrimination 16

1. Self-Incrimination in the English Courts 16

2. Self-Incrimination Before Trial 18

D. The Constitution Does Not "Evolve" 19

Conclusion 23

TABLE OF AUTHORITIES

Cases

Anderson v. United States,
318 U.S. 350 (1943).....8

Bank of Nova Scotia v. United States,
487 U.S. 250 (1988).....8

Bram v. United States,
168 U.S. 532 (1897).....21

Carlisle v. United States,
517 U.S. 416 (1996).....8

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991).....7

Davis v. United States,
512 U.S. 452 (1994).....20

Garner v. United States,
424 U.S. 648 (1976).....20

Malloy v. Hogan,
378 U.S. 1 (1964).....22

McNabb v. United States,
318 U.S. 332 (1943).....8, 9

Michigan v. Tucker,
417 U.S. 433 (1974).....20

Minnesota v. Murphy,
465 U.S. 420 (1984).....20

Miranda v. Arizona,
384 U.S. 436 (1966).....passim

Murphy v. Waterfront Comm'n of New York Harbor,
378 U.S. 52 (1964).....16

Myers v. United States,
272 U.S. 52 (1926).....7

New Jersey v. Portash,
440 U.S. 450 (1979).....20

New York v. Quarles,
467 U.S. 649 (1984).....20

Oregon v. Elstad,
470 U.S. 298 (1985).....20

Palermo v. United States,
360 U.S. 343 (1959).....8

Powers v. United States,
223 U.S. 303 (1912).....22

Rogers v. United States,
340 U.S. 367 (1951).....20

Sparf v. United States,
156 U.S. 51 (1895).....21

United States v. Balsys,
524 U.S. 666 4

United States v. Mitchell,
322 U.S. 65 (1944).....8

Upshaw v. United States,
335 U.S. 410 (1948).....8

Wilson v. United States,
162 U.S. 613 (1896).....21, 22

Statutes

18 U.S.C. § 3501 .....passim

Omnibus Crime Control and Safe Streets Act of 1968,
Pub. L. No. 90-351, 88 Stat. 197 8

Other Authorities

Goebel, J., & T. Naughton, *Law Enforcement in Colonial New York* (1944).....18

Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*,
30 Mich. L. Rev. 1224 (1932); 18

Levy, L., *The Origins of the Fifth Amendment* (1968).....17, 18, 19

Mayers, L., *Shall We Amend the Fifth Amendment?* (1959).....18

Morgan, *The Privilege Against Self-Incrimination*,
34 Minn. L. Rev. 1 (1949).....18

Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*,
22 *Journal of Law Reform* 451 (1989) 16, 17, 18, 23

Scott, A., *Criminal Law in Colonial Virginia* (1930).....18

Williams, G., *The Proof of Guilt* (1963).....18

Constitutional Provisions

U.S. Const. Amend. XIV 4

U.S. Const. Art. I, § 1.....6

U.S. Const. Art. II, § 1 6

U.S. Const. Art. III, § 1 6

U.S. Const. Preamble 1

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because

---

[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

they are ancient and deserve veneration, but because they were the elected representatives of the people.

Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people who ratified the Constitution. It is those promises that are ultimately at stake in this case.

SUMMARY OF ARGUMENT

The problem in this case is that both Congress and this Court have established rules about the admissibility of confessions, and those rules conflict. This Court said, in *Miranda*, that no confession would be admissible unless certain warnings were provided first. Congress said, in 18 U.S.C. § 3501, that *voluntary* confessions would be admissible in federal courts with or without the *Miranda* warnings. This Court must now determine which rules shall prevail.

The federal judiciary can exercise some legislative power for the same reason that the other branches of government can exercise some judicial power. Each branch of government *has* to make internal rules, make internal decisions, and settle internal disputes. But these are not exercises of the powers of the United States. When Congress sanctions one of its members (a judicial function), it is exercising the judicial power of *Congress*, not the judicial power of the United States. Likewise, when the military courts render judgment, they exercise the judicial power of the executive branch, not the judicial power of the United States. Thus, when federal courts establish rules of evidence and procedure, they only exercise the *legislative* power of the federal *judiciary*, not the legislative power of the United States.

Each of these three levels of legislative power takes precedence over the ones below it. Congress cannot use its delegated subset of legislative power to override the ultimate exercise of legislative power in the Constitution. Likewise, the courts cannot use the legislative power of the federal judiciary to override the legislative power of the United States.

The question in this case is whether the prophylactic rules in *Miranda* are a command which flows from the Fifth and Fourteenth Amendments or whether these rules occupy the same place in our constitutional scheme as the Federal Rules of Evidence.

If *Miranda* simply spells out what the Constitution means, then the legislative authority for *Miranda* is the Constitution itself: the ultimate exercise of the legislative power of the United States. In that case, § 3501 is void. But if the *Miranda* warnings are *not* compelled by the Constitution, then the *Miranda* Court was merely exercising the legislative power of the federal judiciary. In that case, § 3501 controls.

The Constitution does not compel *Miranda's* warnings. As this Court recently noted, "what we know of the circumstances surrounding the adoption of the Fifth Amendment, however, gives no indication that the Framers had any sense of a privilege more comprehensive than common law practice then revealed." *United States v. Balsys*, 524 U.S. 666, 674, n. 5. Our Founders ratified the Bill of Rights to protect the *existing* common law privileges from encroachment by Congress, not to open up a fountain of new rights.

The *Miranda* warnings may be the very best statutes a legislature could draft, and the best policy the executive branch could employ, but they are not required by the Constitution. Therefore, they are merely an exercise of the legislative power of the federal judiciary, and Congress's superior legislative power must control. This conviction should therefore be upheld.

ARGUMENT:

THE FIFTH AMENDMENT WAS INTENDED TO PROTECT RECOGNIZED RIGHTS FROM FEDERAL ABUSE, NOT TO CREATE NEW RIGHTS

A. THE LEGISLATIVE POWER OF THE FEDERAL JUDICIARY

1. SEPARATION OF POWERS

This case is not about whether the *Miranda* warnings are wise or unwise, good public policy or bad public policy. This case is about whether the *Miranda* Court properly exercised its judicial power or whether it intruded upon the legislative power of the United States.

The dictionary defines "judicial activism" as a:

> Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for *social engineering* and occasionally these decisions represent *intrusions into legislative and executive matters*.

Black's Law Dictionary (5th ed.) [*emphasis supplied*].

Miranda v. Arizona, 384 U.S. 436 (1966) is a textbook example of this dictionary definition. Chief Justice Warren was explicitly trying to reshape society when he overturned 175 years of Fifth Amendment precedent. The Warren majority was *legislating*, not *judging*, when it established a set

of rules that were intended to apply in all future cases. That violates the constitutional doctrine of separation of powers.

The most potent words in the Constitution may well be those that appear at the beginning of each of the first three Articles. "All legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. Art. I, § 1; "The executive Power shall be vested in a President of the United States of America," U.S. Const. Art. II, § 1; "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. Art. III, § 1. This separation of powers is our *structural* guarantee of lasting liberty, and that guarantee is what is at stake here.

2. The Judiciary Has Its Own Legislative Power

We must compare three different levels of legislative authority in this case. The highest level of authority is the Fifth Amendment, which (like the rest of the Constitution) is the ultimate exercise of the legislative power of the United States. The next level of authority is an Act of Congress: Section 3501 was an exercise of that portion of the legislative power of the United States that was conferred upon Congress in Article I, § 1. The lowest level of legislative power is found in the federal rules of evidence and procedure, which are not an exercise of the legislative power of the United States, but only an exercise of the legislative power of the *federal judiciary*.

Separation of powers does not mean that *every* judicial act must be performed by the judiciary, or that every executive act must be performed by the executive. Each branch of government has to operate from day to day, and that takes

rule-making, decision-making, and administration. Inside its own walls, each branch of government has to do all three.

Thus, when the Supreme Court administers its own business, it is not exercising the "executive power of the United States." It is executing the executive power of the *federal judiciary*, instead. Likewise, when the Supreme Court establishes rules of evidence and procedure, it is exercising the legislative power of the federal judiciary.

3. Congress Can Overrule the Legislative Power of the Judiciary

Congress, by an exercise of the legislative power of the United States, can override an exercise of the legislative power of the federal judiciary. As Justice Scalia has noted:

> Just as Congress may to some degree specify the manner in which the inherent or constitutionally assigned powers of the President will be exercised, so long as the effectiveness of those powers is not impaired, cf. *Myers v. United States*, 272 U.S. 52, 128 (1926), so also Congress may prescribe the means by which the courts may protect the integrity of their proceedings. A court must use the prescribed means unless for some reason they are inadequate.

Chambers v. NASCO, Inc., 501 U.S. 32, 59-60 (1991) (Scalia, J., *dissenting*).

Congress's power to write rules for the courts is unquestioned in principle, although there are difficulties in practice.

See Carlisle v. United States, 517 U.S. 416, 426 (1996)[2]; *Bank of Nova Scotia v. United* States, 487 U.S. 250 (1988); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959). Congress's power to write rules of court is limited by the Constitution, of course: Congress cannot override a rule of Court that is mandated by the Constitution.

4. Overruling the "Unnecessary Delay" Cases

Prior to *Miranda*, this Court decided a whole series of similar cases involving the Federal Rules of Criminal Procedure. Rule 5(a) required that an arrested person be brought before a magistrate without unnecessary delay, and this Court excluded a number of statements because of "unnecessary delay." *See Upshaw v. United States*, 335 U.S. 410 (1948); *United States v. Mitchell*, 322 U.S. 65 (1944); *Anderson v. United States*, 318 U.S. 350 (1943); *McNabb v. United States*, 318 U.S. 332 (1943). These cases would now fall under the *Miranda* rule.

Congress overrode this line of cases in 1968 by a provision in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 88 Stat. 197, 210-11. That Act (which also contains the provision at issue here, § 3501) provided that a voluntary confession by a person in custody is not inadmissible solely because of delay in bringing the person before a magistrate if the confession is made within six

[2] In *Carlisle*, Justice Kennedy dissented, insisting that courts *always* retain the inherent power to do justice, which, in that case, consisted of allowing a judge to acquit an innocent defendant after the expiration of a time limit set by the federal rules of criminal procedure. This case presents the opposite question: whether courts may rely upon an Act of Congress to convict a *guilty* defendant who would be acquitted under court rules. Justice Kennedy's legitimate concern to maintain the court's inherent *judicial* power to "do justice" is therefore not implicated here.

hours of the arrest. Congress replaced the subjective phrase "unnecessary delay" with a bright line rule of "six hours."

McNabb and its progeny could be overruled by a single Act of Congress because they were based on the Federal Rules of Criminal Procedure, not the Constitution itself. If *Miranda* is just a court-created rule of evidence or procedure, it can be overruled in the same way, and § 3501 has done so. If *Miranda* is compelled by the Fifth Amendment, on the other hand, it cannot be overruled, and § 3501 is void. So this whole case turns upon the constitutional status of the *Miranda* warnings.

B. The Original Intention of the Fifth Amendment

Miranda's status depends on the true meaning of the Fifth Amendment. This *amicus* believes that the true meaning of the Constitution can never be determined without reference to the original intentions of those who drafted and ratified it. The original intent of the Fifth Amendment was to protect Americans from compelled testimony, not to keep voluntary confessions out of court. *Miranda* is therefore not compelled by the Fifth Amendment.

1. A Patriotic Zeal for Common Law Liberties

It is easy to forget how new and frightening the federal government seemed to the founding generation. Some of the most well-known patriots were sure that the Constitution had created a monster that would devour individual liberties and State autonomy. Anti-Federalists like Patrick Henry and George Mason fanned the flame of fear in a last-ditch effort to keep the Constitution from being ratified. In the Virginia

Ratification Debates, Patrick Henry delivered a fiery speech demanding a bill of rights:

> In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.

3 Elliot, Jonathan, Debates on the Federal Convention 447-48 (2d ed. 1863) [hereafter, "Elliot's Debates"].

2. THE INEXHAUSTIBLE COMMON LAW

One way to solve the problem would have been to draft a bill of rights that spelled out the limits of the new federal government. The problem with that approach was that our Founders wanted to preserve *all* their common law privileges and immunities. A bill of rights, by definition, could only protect those privileges it enumerated, and that would leave out many rights protected at common law.

To our Founders, the common law was an ancient, complex, and inexhaustible source of liberty. They knew they could never list every traditional privilege or immunity, and they were initially unwilling to itemize rights for fear some might view it as an *exhaustive* list. In the ratification debates, the Federalists kept insisting that a bill of rights was not needed because Congress was limited to its *enumerated* powers. It just could not do what the Anti-Federalists feared. James Wilson of Pennsylvania explained the matter thus:

> In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.

2 Elliot's Debates, *supra*, 436-37.

3. THE ANTI-FEDERALISTS FEARED CONGRESS'S "EXCLUSIVE POWER OF LEGISLATION" IN THE NEW FEDERAL DISTRICT

This enumerated powers argument, unfortunately, had a chink in its armor: Congress had an "exclusive power of legislation" within what was to become the District of Columbia. The Anti-Federalists quickly concentrated their fire upon that point:

> Mr. GEORGE MASON thought that there were few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes.... Now, sir, if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection. If any of their officers, or creatures, should attempt to oppress the people, or should actually perpetrate the blackest deed, he has nothing to do but get into the ten miles square. Why was this dangerous power given? Felons may receive an asylum there and in their strongholds.

3 Elliot's Debates, *supra*, 431-32.

Much of the Bill of Rights was intended to respond to Anti-Federalists fears that the new federal government would not be subject to the principles of the common law. Anti-Federalist patriots argued that Congress could make any laws it wished, since it would meet outside the boundaries of any State and within the boundaries of a new capitol district. They argued that a tyrannical Congress could compel citizens to come and be tried within that district, where no law would protect them but that which Congress chose to make. To men like Patrick Henry, who had stood on common law rights against the British Empire, the exclusive power of legislation within the capitol district made the new government into a unchecked monster in a lawless lair.

Anti-Federalists in other States raised the same concerns. This frustrated the Federalists. Richard Dobbs Spaight, of North Carolina, struggled to rebut claims made by William Lenoir:

> He objects to giving the government exclusive legislation in a district not exceeding ten miles square, although the previous consent and cession of the state within which it may be, is required. Is it to be supposed that the representatives of the people will make regulations therein dangerous to liberty? Is there the least color or pretext for saying that the militia will be carried and kept there for life? Where is there any power to do this? The power of calling forth the militia is given for the common defence; and can we suppose that our own representatives, chosen for so short a period, will dare to pervert a power, given for the general protection, to an absolute oppres-

> sion? But the gentleman has gone farther, and says, that any man who will complain of their oppressions, or write against their usurpation, may be deemed a traitor, and tried as such in the ten miles square, without a jury. What an astonishing misrepresentation!

4. PROPOSED SOLUTIONS

The Anti-Federalists failed to stop the Constitution, but they did raise enough concerns to assure some kind of a bill of rights. The various proposals put forth by different States show that the Founders' primary purpose was to make sure the District did not become a seat of tyranny.

For example, in the New York ratification debates, Melancton Smith proposed an amendment that would specifically make common law rights apply to cases within the District. He proposed:

> Resolved, as the opinion of this committee, that the right of the Congress to exercise exclusive legislation over such district, not exceeding ten miles square...shall not be so exercised as to...authorize any inhabitant of the said district to bring any suit in any court, which may be established by the Congress within the same, against any citizen or person not an inhabitant of the said district. And it is understood that the stipulations in this Constitution, respecting *all essential rights*, shall extend as well to this district as to the United States in general.

2 Elliot's Debates, *supra*, 410 [*emphasis supplied*].

Pennsylvania suggested limiting the legislative power of Congress over the District. It resolved:

> That the clause respecting the exclusive legislation over a district not exceeding ten miles square be qualified by a proviso that such right of legislation extend only to such regulations as respect the police and good order thereof.

2 Elliot's Debates, *supra*, 545.

Virginia and North Carolina agreed upon identical language to solve the perceived problem:

> That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places, purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof.

3 Elliot's Debates, *supra*, 660; 4 Elliot's Debates, *supra*, 245.

In the end, of course, Congress chose to enact our Bill of Rights instead of establishing the common law within the District of Columbia or limiting congressional power over the District. But the *meaning* of the Bill of Rights cannot be divorced from its *purpose*. The purpose of the Fifth Amendment was to provide the same basic protection within the District that the common law would provide. We must therefore examine what those protections were in 1791.

C. THE PRIVILEGE AGAINST SELF-INCRIMINATION

1. SELF-INCRIMINATION IN THE ENGLISH COURTS

By 1791, criminal defendants in England and America had a time-tested right to remain silent. Our Founders drafted and ratified the Fifth Amendment to protect this right. They wanted to make completely sure that Congress could *never* subject a criminal defendant to what this Court later described as the "cruel trilemma" of perjury, contempt, or self-accusation. *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52, 55 (1964).

England had developed the privilege against self-incrimination the hard way. The long dynastic struggle of the Wars of the Roses had come to an end when Henry Tudor took the throne as Henry VIII, but it took a divorce, a break with the Roman Catholic Church, and wife after wife to keep that new dynasty going. England wobbled between religions: Henry went Protestant; his daughter Mary turned the country back to Catholicism; and Elizabeth returned to Protestantism. In this religious strife, ecclesiastical courts like the Court of High Commission took the lead in hunting down heretics. Defendants before the ecclesiastical courts could be required to take an oath — the *oath ex officio* — to answer truthfully all questions that might be put to him. Courageous defendants could refuse to take the oath, citing the maxim, "*nemo tenetur prodere seipsum,*" which means, "no one is bound to accuse himself." Yet this refusal might result in fines, imprisonment, corporal punishment, or even, occasionally, death. Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*, 22 *Journal of Law Reform* 451, 454 (1989) [hereafter, "Pretrial Interrogation"]; *see* L. Levy, *The Origins of the Fifth*

Amendment, 3-4, 23-24, 44-51, 55, 66-67, 77-78, 101-05, 127, 130-33, 141-43, 154-59, 166, 174-79, 250, 266-71, 274-77 (1968).

The Pilgrims fled England for Holland in 1607, then left Holland for Plymouth Rock in 1620. Their neighbors, the Puritans, began arriving in Massachusetts Bay a few years later. While they built homes in a new world, the religious pressures they left behind finally resulted in the English Civil War. The "Long Parliament" that convened in 1640 struck out against the ecclesiastical excesses, adopting statutes that abolished the Court of High Commission and the notorious Court of Star Chamber. This legislation further provided that all trials were thereafter to be determined "in the ordinary Courts of Justice and by the ordinary course of the law," the source of our modern concept of "due process." Pretrial Interrogation, *supra*, 455; *see* Levy, *supra*, 228-313. (The English experience with Oliver Cromwell led to even more reforms, later.)

England placed a high value on these hard-won rights, but Massachusetts had to experience its own version of ecclesiastical excess. The Salem witch trials only lasted from May to October of 1692, but the nineteen hangings that resulted from those coerced confessions branded the conscience of the colony and the nation down all three centuries since.

By the start of the eighteenth century, therefore, there was a true right against compulsory self-incrimination in English and American courts. Defendants and witnesses claimed a right to refuse to answer incriminating questions, and this right was increasingly accepted by the courts. Pretrial Interrogation, *supra*, 455-56; *see* Levy, *supra*, 283-85, 313-20, 323.

2. SELF-INCRIMINATION BEFORE TRIAL

Miranda dealt with out-of-court interrogation, so we must look further if we are to understand how the Fifth Amendment was intended to apply in *pretrial* interrogations. Professional police forces did not exist at the time the Constitution and Bill of Rights were ratified. In 1791, the constables who made arrests were not authorized to question the suspects they took into custody. That function was carried out by justices of the peace or other judicial officers in the preliminary examination. Pretrial Interrogation, *supra*, 457; *see* J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 134, 339-41, 565, 633-36, 653-56 (1944); Levy, *supra*, at 29-30, 35, 325; L. Mayers, *Shall We Amend the Fifth Amendment?* 16, 175-76, 179-80 (1959); A. Scott, *Criminal Law in Colonial Virginia* 48-49, 55-56, 59-60 (1930) ; G. Williams, *The Proof of Guilt* 44 (1963); Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1231-33, 1235-36 (1932); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 14, 19 (1949).

After the American Revolution began, in 1776, nine states adopted constitutions which incorporated, to varying degrees, enumerations of the rights of defendants in criminal cases. Pretrial Interrogations, *supra*, 459-60. The federal Bill of Rights was intended to make sure that the federal government could not take away these recognized rights. But, as the author of one comprehensive historical study on the Fifth Amendment explains:

> The fact must be emphasized that the right in question was a right against compulsory self-incrimination, and, excepting rare occasions when judges intervened to protect a witness against incriminating interrogatories, the right had to be claimed by a defendant. Historically it had been a fighting right: unless invoked, it offered no protection. It vested an option to refuse answer but did not bar interrogation nor taint a voluntary confessions as improper evidence. Incriminating statements made by a suspect at the preliminary examination or even at arraignment could always be used with devastating effect at his trial. That a man might unwittingly incriminate himself when questioned in no way impaired his legal right to refuse answer. He lacked the right to be warned that he need not answer, for the authorities were under no legal obligation to appraise him of his right. That reform did not come in England until Sir John Jervis's Act in 1848, and in the United States more than a century later the matter was still a subject of acute constitutional controversy. Yet if the authorities in eighteenth-century Britain and her colonies were not obliged to caution the prisoner, he in turn was not legally obliged to reply. His answers, although given in ignorance of his right, might secure his conviction, but by the mid-eighteenth century the courts, at least at Westminster, were willing to consider the exclusion of confessions that had been made involuntarily or under duress.

Levy, *supra*, at 375.

D. THE CONSTITUTION DOES NOT "EVOLVE"

Despite the evidence of the original intent of the Fifth Amendment, Petitioner argues that the Framers thought the rights against self-incrimination "not only were part of a complex of other trial rights, but also were *evolving* rights

that changed as criminal procedures developed." Petitioner's Brief, p. 35. Thus, Petitioner argues that a right that was *not* protected by the Constitution in 1791 is protected *now* through a process of evolution.

Petitioner must stretch his argument considerably further than that to win in this case. He must not only explain why the Constitution *now* protects something that it did *not* protect when the Fifth Amendment was ratified in 1791, but also why this Court should reject what it said when it addressed these issues in 1895, 1896, 1897, 1912, 1951, 1964, 1974, 1976, 1979, 1984, 1985, and 1994.

This Court has consistently said that the Fifth Amendment is only violated when suspects are subjected to actual compulsion in custodial interrogation. Mere departures from *Miranda* do not entail any constitutional violation. *See Davis v. United States*, 512 U.S. 452, 457-58 (1994); *New York v. Quarles*, 467 U.S. 649, 654-55 (1984); *Oregon v. Elstad*, 470 U.S. 298, 306-09 (1985); *New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979); *Michigan v. Tucker*, 417 U.S. 433, 443-46 (1974). The current precedents relating to custodial interrogation are, of course, consistent on this point with the Fifth Amendment precedents from other contexts, which similarly recognize that warnings, waivers, and the like are not required by the Fifth Amendment. *See Minnesota v. Murphy*, 465 U.S. 420, 427-39 (1984) (in questioning of probationer by probation officer, as in questioning of witness at trial or before grand jury, Fifth Amendment right affords no protection unless asserted on the initiative of the person questioned; *Miranda* warnings are not required); *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976) ("an individual may lose the benefit of the [Fifth Amendment] privilege without making a knowing and intelligent waiver"); *Rogers v. United States*, 340 U.S. 367 (1951) (answer to incriminating question constituted waiver of the Fifth Amendment right by grand jury witness who was unaware of the existence of the right).

Judicial precedent shows the same historical understanding: The admissibility of defendants' pretrial statements obtained in custodial interrogation historically depended on their voluntariness—which was identified with the Fifth Amendment standard—and the various procedural restrictions imposed by the *Miranda* decision were held not to be constitutionally required. Thus, for example, in *Sparf v. United States*, 156 U.S. 51 (1895), the Court upheld the disclosure at trial of pretrial admissions made by the defendant while under restraint on suspicion of murder, because the statements were voluntary. *See id.* at 55-56. Shortly thereafter, in *Bram v. United States*, 168 U.S. 532 (1897), the Court explicitly equated the voluntariness standard and the Fifth Amendment standard:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Bram, 168 U.S. at 542.

Other early cases directly considered the question whether *Miranda*-like procedures are necessary. In *Wilson v. United States*, 162 U.S. 613 (1896), a defendant challenged the admission of pretrial statements he had made when questioned by a federal commissioner, essentially on

the ground that his interrogation had violated many of the rules that were later imposed in the *Miranda* decision. He had not been advised that he need not answer; he had not been advised that his statements could be used against him; he not been advised of a right to representation by counsel; and he had not in fact been afforded counsel. The Court responded that the admissibility of a defendant's statements depends on their voluntariness, and that the absence of warnings and counsel would not warrant their exclusion. *See* 162 U.S. at 623-24.

The Court again addressed this question, this time in explicitly constitutional terms, in *Powers v. United States*, 223 U.S. 303 (1912). *Powers* involved the admission at trial of a statement made by the defendant in response to questioning by a deputy marshal at a preliminary hearing. The defendant claimed that the admission of his statement "worked a violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution, which protects him against self-incrimination." 223 U.S. at 313-14. The Court rejected this claim—citing the decision under the voluntariness standard in *Wilson v. United States* as controlling precedent—on the ground that warnings and counsel are not required and that voluntary statements "cannot be excluded when subsequently offered at...trial." 223 U.S. at 313-14. *Powers* further demonstrates both that *Miranda*-like procedures were regarded as unnecessary for compliance with the Fifth Amendment, and that the Fifth Amendment standard was not considered to require more than the voluntariness standard.

The same point appears from *Malloy v. Hogan*, 378 U.S. 1 (1964). Decided only two years before *Miranda*, *Malloy* held that the Fifth Amendment right against compelled self-incrimination applied to the states. The decision in *Malloy* was premised in part on the fact that the admissibility of confessions in state cases was already governed by the voluntariness standard, which was identical to the Fifth Amendment standard: "[T]he admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since...*Bram v. United States*...held that...the issue is controlled by...the Fifth Amendment." 378 U.S. at 7; *see Pretrial Interrogations, supra*, 22 U. Mich. J. L. Ref. at 494-95 (noting historical fallacies of *Miranda* decision); *id.* at 453-91 (comprehensive review of pertinent history).

Petitioner goes too far. Our Founders ratified the Bill of Rights to apply the ancient traditions of England to a brand-new federal government, not to serve as fountain of judicial novelty. Our Founders thought of the judiciary as "the least dangerous branch," not the source of an "evolving Constitution" detached from any text, unchecked by any tradition, and beyond the power of any legislative check or balance. This Court has consistently held that the Fifth Amendment prohibits compelled testimony, not voluntary confessions. It should do the same in this case.

CONCLUSION

The question before this Court is *not* whether § 3501 is "better" than the *Miranda* warnings. This case is about power, not wisdom. If § 3501 is unconstitutional, Congress does not have the power to enact it. If § 3501 is constitutional, then it makes no difference how wise or foolish it is. That is a matter for legislators—and ultimately, voters—to consider, not judges. Our Constitution does not set up a "good government contest" with prizes going to the cleverest branch: it *divides* the specific powers of government.

This *amicus* thinks the *Miranda* warnings generally lead to good police practice. We think they are wise public policy. We like a system where police demonstrate real respect for the rights of the accused much better than the bad old days of hot lights and rubber hoses. But none of those things makes *Miranda* an exercise of the *judicial* power of the United States. *Miranda* is legislation.

The Fifth Amendment prohibits the federal government from compelling any criminal defendant to be a witness against himself. If the government has *compelled* Petitioner to testify against himself in this case, this conviction must be overturned. But if, as a matter of fact, the Petitioner has confessed voluntarily, this Court should not perpetuate the fiction that the *Constitution* bars his conviction. It is the Court, not the Constitution, that stands in the way. And since the Court was *legislating* when it decided *Miranda*, it should now get out of the way. This conviction should be upheld.

Respectfully Submitted,

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of
the Constitution, at
Patrick Henry College
P.O Box 1776
Purcellville, VA 20134
(540) 338-1776
* *Counsel of Record*

Mar 9 2000

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF COURT-APPOINTED AMICUS CURIAE URGING AFFIRMANCE OF THE JUDGMENT BELOW

Paul G. Cassell
(Court-Appointed Amicus)
University of Utah
College of Law
332 S. 1400 E. Front
Salt Lake City, UT 84112
(801) 585-5202

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: March 9, 2000

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. 3501 where the confession was not preceded by the warnings specified in *Miranda v. Arizona*, 384 U.S. 436 (1966).

TABLE OF CONTENTS

Page

Statement 1
Introduction and Summary of Argument 1
Argument:
I. Section 3501 is a permissible restructuring by Congress of a prophylactic rule that sweeps more broadly than the Constitution 4
A. *Miranda* did not create a new constitutional right empowering the defendant to exclude at trial his unwarned, but voluntarily given, statement 5
1. *Miranda* created non-constitutional, prophylactic rules 5
2. The Court's more recent decisions leave no doubt that compliance with *Miranda*'s rules is not a constitutional prerequisite for admitting confessions 7
B. The *Miranda* rules are best viewed as an exercise of the Court's power to craft safeguards for constitutional rights in the absence of legislative action 9
C. The application of *Miranda*'s rules in state cases does not demonstrate that the rules are constitutional requirements 15
D. The application of *Miranda's* rules in habeas proceedings does not demonstrate that the rules are constitutional requirements 20
E. Considerations of stare decisis support upholding Section 3501 22
F. Policy considerations support upholding Section 3501 24

II. Even if the Court is empowered to demand some level of prophylaxis beyond constitutional requirements, Section 3501, taken together with other provisions of law, provides adequate protection 28
A. Section 3501 contains protective measures against compelled confessions 30
B. Other protective measures against compelled confessions have expanded considerably since 1966 34
C. Section 3501, combined with civil rights actions and other remedies, creates a constitutionally adequate alternative to the *Miranda* rules 37
III. If Congress cannot alter *Miranda*'s irrebuttable presumption, this Court should 40
A. *Miranda*'s irrebuttable presumption is not congruent and proportional to the problem of involuntary confessions 41
B. Changing *Miranda*'s irrebuttable presumption to a rebuttable one would create a remedial measure congruent and proportionate to the problem of coercive police conduct 45
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Alabama v. White, 496 U.S. 325 (1990) 47
Anders v. California, 386 U.S. 738 (1967) 11
Arizona v. Roberson, 486 U.S. 675 (1988) 7
Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967) 17
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 17
Beckwith v. United States, 425 U.S. 341 (1976) . . . 25
Bell v. Hood, 327 U.S. 678 (1946) 34
Berkemer v. McCarty, 468 U.S.420 (1984) 31
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 3, 10, 11, 34, 37
Blackledge v. Perry, 417 U.S. 21 (1974) 13
Bush v. Lucas, 462 U.S. 367 (1983) . . . . . *passim*
Chambers v. States, 742 So.2d 466 (Fla. Dist. Ct. App. 1999) 47
City of Boerne v. Flores, 521 U.S. 507 (1997) . *passim*
Coleman v. Thompson, 501 U.S. 722 (1991) 45
Colorado v. Connelly, 479 U.S. 157 (1986) 49
Colorado v. Spring, 479 U.S. 564 (1987) 33
Connecticut v. Barrett, 479 U.S. 523 (1987) 16
Davis v. United States, 512 U.S. 452 (1994) 2, 5, 7, 16, 22
Dennis v. Higgins, 498 U.S. 439 (1991) 17
Duckworth v. Eagan, 492 U.S. 195 (1989) 12
Edwards v. Arizona, 451 U.S. 477 (1981) 26
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) . 22
Harris v. New York, 401 U.S. 222 (1971) 3, 8, 16, 22, 38
Harris v. South Carolina, 338 U.S. 68 (1949) 33
Illinois v. Gates, 462 U.S. 213 (1983) 46, 47
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 37
Katzenbach v. Morgan, 384 U.S. 641 (1966) 41

Kimel v. Florida Board of Regents,
120 S.Ct. 631 (1999) 41, 43
Lassiter v. Northampton Election Board,
360 U.S. 45 (1959) 41
Lego v. Twomey, 404 U.S. 477 (1972) 47
Mapp v. Ohio, 367 U.S. 643 (1961) 10
Michigan v. Harvey, 494 U.S. 344 (1990) 16, 20
Michigan v. Jackson, 475 U.S. 625 (1986) 19
Michigan v. Mosley, 423 U.S. 96 (1975) 16
Michigan v. Tucker, 417 U.S. 433 . . . . . 7, 9, 22, 42
Miller v. Fenton, 474 U.S. 104 (1985) 37
Mincey v. Arizona, 437 U.S. 385 (1978) 8, 9
Minnick v. Mississippi, 498 U.S. 146 (1990) 16
Miranda v. Arizona, 384 U.S. 436 (1966) . . . . *passim*
Moran v. Burbine, 475 U.S. 412 (1986) 16, 19, 35, 45
Murray v. Giarratano, 492 U.S. 1 (1989) 40
Mu'Min v. Virginia, 500 U.S. 415 (1991) 18
National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985) 22
New Jersey v. Portash, 440 U.S. 450 (1979) 8
New York v. Quarles, 467 U.S. 649 (1984) . . *passim*
Nixon v. Shrink Missouri Government PAC,
120 S.Ct. 897 (2000) 48
North Carolina v. Butler, 441 U.S. 369 (1979) 27
North Carolina v. Pearce, 395 U.S. 711 (1969) . . . 17
Northeast Bancorp v. Board of Governors,
472 U.S. 159 (1985) 18
Oregon v. Elstad, 470 U.S. 298 (1985) . . . . . *passim*
Oregon v. Hass, 420 U.S. 714 (1975) . . . . . *passim*
Palermo v. United States,
360 U.S. 343 (1959) 4, 13, 15
Payne v. Tennessee, 501 U.S. 808 (1991) 48
Pennsylvania v. Wheeling & Belmont Bridge Co.,
59 U.S. 421 (1856) 18
Planned Parenthood v. Casey, 505 U.S. 833 (1992) 23
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) . . 29

Schweiker v. Chilicky,
487 U.S. 412 (1988) 11, 12, 14, 15, 39
Smith v. Robbins,
120 S. Ct. 746 (2000) 4, 11, 12, 39, 40
State v. Randolph, 370 S.W.2d 741 (W. Va. 1988) . 33
State v. Scales, 518 N.W.2d 587 (Minn. 1994) 30
Stephan v. State, 711 P.2d 1156 (Alaska 1985) . . . 30
Stone v. Powell, 428 U.S. 465 (1976) 21, 43
Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 27
United States v. Alvarez-Sanchez,
511 U.S. 350 (1994) 23
United States v. Balsys, 18 S.Ct. 2218 (1999) 12
United States v. Cheely,
21 F.3d 914 (9th Cir. 1994) 5
United States v. Crocker,
510 F.2d 1129 (10th Cir. 1975) 5, 26
United States v. Green, 504 U.S. 908 (1992) 42
United States v. Lanier, 520 U.S. 259 (1997) 35
United States v. Leasure, 122 F.3d 837 (9th Cir. 1997), *cert. denied*, 522 U.S. 1065 (1998) . . . 25
United States v. Otherson,
637 F.2d 1276 (9th Cir. 1980) 35
United States v. Rivas-Lopez,
988 F. Supp. 1424 (D. Utah 1997) 5
United States v. Tapia-Mendoza,
41 F.Supp.2d 1250 (D. Utah 1999) 5
Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 27, 30
Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) 34
Withrow v. Williams,
507 U.S. 680 (1993) 7, 20, 22, 27, 42

Constitution, statutes, and regulations:

U.S. Const.:
- Art. I, § 8 41
- Amend. IV 10, 29
- Amend. V (Self Incrimination Clause) . . . *passim*
- Amend. XIV, § 5 41

18 U.S.C. 241 . . . . . 35, 36
18 U.S.C. 242 . . . . . 35, 36
18 U.S.C. 3501 . . . . . *passim*
18 U.S.C. 3501(a) 23, 46
18 U.S.C. 3501(b). 31, 33
18 U.S.C. 3501(c) 23
28 U.S.C. 530B 35
28 U.S.C. 1331 22
28 U.S.C. 2254(a) 21
42 U.S.C. 14141 37
42 U.S.C. 1983 36
28 C.F.R. 0.50 35
Ariz. Rev. Stat. Ann. § 13-3988 30
La. Const. Art. I, § 13 30

Miscellaneous:

Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles (1997) 30

Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 Iowa L. Rev. 175 (1999) 25

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 Stan. L Rev. 1055 (1998) 29

Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 Nw. U.L. Rev. 387 (1996) 29, 44

Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. Rev. 839 (1994) 29

146 CONG. REC. S760 (Feb. 24, 2000) 25

Dept. of Justice Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation, 22 U. Mich. J. L. Ref. 437 (1989) 5, 25, 28, 36, 48

Developments in the Law — Confessions, 79 HARV. L. REV. 938 (1966) 47

Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts of the House Judiciary Comm., 104th Cong., 2d Sess. Sept. 12, 1996 35

Fred Graham, *The Self-Inflicted Wound* 324 (1970) . 32

Joseph D. Grano, *Confessions, Truth and Law* (1993) 5

Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. Chi. L. Rev. 174 (1988) 19

3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 10.3(c) (2d ed. 1999) 47

Barry Latzer, State Constitutional Criminal Law (1995 & 1999 Supp.) 30

Letter from Richard A. Fiano, DEA's Chief of Operations, to Frank A.S. Campbell (Oct. 13, 1999) 25

Letter from Larry R. Parkinson to Eleanor D. Acheson (Oct. 19, 1999) 25

MODEL RULES OF PROFESSIONAL CONDUCT 35

Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 10

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) 44
S. Rep. No. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2132 . . . . . 26, 44
S. Rep. No. 93-588 (1974), reprinted in 1974 U.S.C.C.A.N. 2789, 2791 34
Larry W. Yackle, *Post Conviction Remedies* (1981 & Supp. 1996) 21

STATEMENT

The facts of this case and proceedings below have been adequately summarized by the parties. We emphasize only that this case is before this Court with a district court finding that petitioner Dickerson's incriminating statements were voluntary. J.A. 155, 158, 212.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate question in this case is whether the federal criminal justice system must exclude from evidence a criminal suspect's voluntary statement, despite an Act of Congress to the contrary. *Miranda v. Arizona*, 384 U.S. 436 (1966), automatically excludes such a statement if it was given in response to custodial questioning without the required warnings. It enforces that exclusion on the basis of an irrebuttable presumption that such questioning by police must in every case have coerced the confession. This presumption controls regardless of how frequently it is false; regardless of how much it costs the integrity and truthfulness of the trial, if a trial is still possible; and regardless of how abundant the evidence may be in a particular case that the suspect understood his situation and made his own decision to speak. Nothing in the Constitution requires this uncompromising rule or strips the elected branches of their authority to modify it.

Congress' decision to enact Section 3501 was consistent with the Constitution. *Miranda* did not, and of course could not,

---

[1] The case at this stage presents no challenge to the way in which 18 U.S.C. 3501 was raised below. In the district court, career prosecutors argued that Section 3501 required reconsideration of the court's decision suppressing Dickerson's confession. J.A. 94-6. On appeal to the Fourth Circuit, the prosecutors' superiors in the Department of Justice did not permit them to continue pressing that position. This led the Washington Legal Foundation to seek and obtain leave of the court to brief and argue as amicus curiae in defense of the statute, a defense which was successful. J.A. 184-85. Dickerson's petition for certiorari also sought review of the question whether Section 3501 was "properly raised" below, but the Court declined to consider the issue.

simply redraft the Fifth Amendment to include a new constitutional right (or, as the *Miranda* Court put it, create a "constitutional straitjacket," 384 U.S. at 467) prohibiting the use of unwarned, though voluntary, statements. Later pronouncements by the Court have confirmed that *Miranda*'s exclusionary rule was instead a preventive measure — part of a "series of recommended procedural safeguards," *Davis v. United States*, 512 U.S. 452, 457-458 (1994), that "sweep[] more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). Because *Miranda*'s exclusionary rule was in this sense judicially improvised, rather than constitutionally required, *Miranda* necessarily accommodates legislative modification. Accordingly, there is neither need nor reason to overrule *Miranda* in order to uphold Section 3501.

The benefits of *Miranda* are preserved virtually intact by Section 3501. There is ample reason to conclude that *Miranda* warnings will remain a standard law enforcement practice, because the statute, as well as numerous other legal rules, makes it very much in every officer's interest to continue to give them. What Section 3501 changes is not so much the officer's incentive to give warnings, but rather *Miranda*'s draconian remedy for any defect in giving them (or, as here, just in proving they were given). As Congress understood, the *automatic* character of *Miranda's* exclusionary rule is excessive because, heedless of the costs, it excludes confessions that manifestly were not produced by the police coercion that was *Miranda*'s principal target.

So long as *in*voluntary confessions remain banned, as they are under Section 3501, and so long as trial courts are empowered without limitation to examine and thwart any police behavior that produces involuntary confessions — again as they are under the statute — *Miranda*'s automatic exclusionary rule is unnecessary to preserve the full breadth of a suspect's Fifth Amendment right not to be compelled to be a witness against himself. Because *Miranda's* automatic rule excluding *unwarned* statements extends beyond the Fifth Amendment's bar on *actually compelled* statements, Congress was free to balance for itself the costs and benefits of that automatic rule, and to supersede it with a rule

more in keeping with the facts of each case and more faithful to the text of the Fifth Amendment.

In Section I below, we show that Congress had the authority to modify *Miranda*'s exclusionary rule as it did in Section 3501. The rule was an exercise by the Court of its power to devise, in the absence of legislation, prophylactic measures that may extend beyond constitutional requirements in order to protect the underlying constitutional right. In cases such as *New York v. Quarles*, 467 U.S. 649 (1984), *Harris v. New York*, 401 U.S. 222, 224 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Court has made clear that there is "no constitutional imperative," 467 U.S. at 658 n.7, requiring the exclusion of an unwarned yet voluntary statement. Section 3501 is built on this understanding, while fully honoring the requirements of the Fifth Amendment by continuing a blanket ban on involuntary confessions. Nothing in the Constitution provides grounds for the Court to invalidate the decision of Congress to modify the overprotective and extraconstitutional features of the court-devised rule.

In Section II, we show that even if the judicial branch properly may require some measure of prophylaxis beyond what the Constitution requires, Section 3501, taken together with the considerable development over the last 34 years of other statutes, rules and remedies regulating police behavior, amply provides the needed measure of protection. By listing the rendition of warnings as a factor a court *must* consider in making voluntariness determinations, Section 3501 itself provides strong incentives for federal officers to continue delivering warnings. Moreover, Section 3501 should not be examined in a vacuum. Congress has bolstered the protections the statute provides with other rules such as a 1974 provision allowing suits against federal agencies that produce coerced confessions. These measures, along with post-*Miranda* judicial doctrines like *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and improved training of federal law enforcement officers, adequately protect Fifth Amendment values.

In Section III, we show that, whether or not Section 3501 supersedes *Miranda* of its own force, the Court itself should modify

Miranda's irrebuttable, but certainly factually incorrect, presumption that every unwarned confession is *ipso facto* involuntary and hence must be excluded. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that when Congress legislates to protect constitutional rights, its remedy should be both congruent and proportional to the evil it aims to address. Applying the proportionality standard to the Court's prophylactic rules, it follows that the now-automatic exclusionary rule of *Miranda* should be changed to allow the government to prove, if it can, that in a given case an unwarned or imperfectly warned statement was nonetheless a product of free will.

ARGUMENT

I. SECTION 3501 IS A PERMISSIBLE RESTRUCTURING BY CONGRESS OF A PROPHYLACTIC RULE THAT SWEEPS MORE BROADLY THAN THE CONSTITUTION.

The question whether *Miranda*'s automatic exclusionary rule or Section 3501 governs the admissibility of confessions turns on whether *Miranda*'s rule is constitutionally required. If it is, then plainly Congress could not change it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). If otherwise — if instead it is, as the Court often has stated, a judicially-devised remedy that "serves" the Fifth Amendment but "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) — then it is equally plain that Congress does have the power to modify it. *See Smith v. Robbins*, 120 S.Ct. 746 (2000); *Palermo v. United States*, 360 U.S. 343 (1959). Congress may substitute a different remedial regime so long as that regime honors what the Constitution requires.

The court below determined that *Miranda*'s exclusionary rule is not constitutionally required, and that Section 3501 is a permissible modification.[2] Both conclusions are correct.

A. *Miranda* Did Not Create a New Constitutional Right Empowering the Defendant to Exclude at Trial His Unwarned, But Voluntarily Given, Statement

The *Miranda* rule "is not itself required by the Fifth Amendment's prohibition on coerced confessions . . . ." *Davis v. United States*, 512 U.S. at 458. This conclusion is supported by the text and history of the Fifth Amendment, the structure of the *Miranda* decision, and numerous subsequent holdings from the Court interpreting *Miranda*.

1. *Miranda* Created Non-Constitutional, Prophylactic Rules

Until 1966, no special rule governed the admissibility in federal court of incriminating statements made by a suspect in police custody. Instead, as the court below explained, the approach regarding such statements "remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily." J.A. 194. *See generally* JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 87-144 (1993); *Dept. of Justice Office of Legal Policy, Report to the Attorney General on the Law of Pretrial Interrogation, reprinted in* 22 U. MICH. J.L. REF. 437, 453-91 (1989) ("*DOJ Report*"). In 1966, however, the Court considered whether there should be additional protection for a suspect during

---

[2] The other courts that have squarely decided the issue have reached the same conclusion as the court below. *See United States v. Crocker*, 510 F.2d 1129, 1136-38 (10th Cir. 1975) (alternative holding); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997); *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1256 (D. Utah 1999); *but cf. United States v. Cheely*, 21 F.3d 914, 923 (9th Cir. 1994) (two-sentence conclusion that Section 3501 does not "trump" *Edwards v. Arizona*).

custodial police questioning. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court concluded that in such circumstances, the voluntariness rule should be supplemented with the now well-known warnings and waiver procedure.

The parties view these supplements as virtual — although they concede, not actual — requirements of the Fifth Amendment's prohibition against any person being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. They are then left to wonder about the conceded "tension" their view creates with numerous later cases repeatedly emphasizing that those safeguards are "not themselves rights protected by the Constitution," *e.g.*, *New York v. Quarles*, 467 U.S. 649, 654 (1984) (internal quotation omitted). Govt. Br. at 39. The parties make no effort to sketch a consistent theory that would reconcile the holdings of these later cases, *see infra* at p.16, n.10, with the features of those cases (*Miranda*'s application to the states and the like) that the parties favor. The failure to advance a reconciling theory, or any theory specifically explaining *Miranda*'s constitutional basis, is the conceptual black hole in the parties' case. Their failure to resolve this central analytical issue impeaches the fundamentals of their claim that *Miranda* is immune from legislative change.[3]

There is certainly language in *Miranda* that can be read as imposing constitutional requirements. *See* Pet. Br. at 18-20. But even without reference to later opinions that remove any doubt, *Miranda* is better read as creating safeguards rather than establishing previously unseen requirements of the Fifth Amendment itself.

The *Miranda* Court stated that it had no intention of "creat[ing] a constitutional straitjacket." *Miranda*, 384 U.S. at 467. This disclaimer is difficult to explain if the Court believed the specific rules it announced were ordained by the Constitution.

---

[3] Dickerson does at times appear to offer a theory of *Miranda*, albeit one that cannot and does not seriously purport to survive *Quarles* and similar cases. Pet. Br. at 22-27. The Department offers no theory.

The opinion characteristically speaks of the "potentiality" of compulsion and the need for "appropriate safeguards" designed "to insure" that statements are the product of free choice, as well as the possibility of Fifth Amendment rights being "jeopardized" by custodial interrogation. 384 U.S. at 457, 479. But potential compulsion is different from actual compulsion; jeopardizing Fifth Amendment rights is different from violating them; and assuring that Fifth Amendment rights are protected is different from concluding that they are always infringed without those protections. *Miranda's* rationale is, therefore, prophylactic in precisely the sense the Court's later cases have used that term.

2. The Court's More Recent Decisions Leave No Doubt that Compliance with *Miranda*'s Rules is not a Constitutional Prerequisite for Admitting Confessions

More than a quarter century of this Court's jurisprudence, starting with *Michigan v. Tucker*, 417 U.S. 433, 443-444 (1974), establishes beyond argument that the Constitution does not require *Miranda* warnings. Still less does it require the rule that a demonstrably voluntary confession must be excluded simply because the warnings were absent, defective as to some particular, or (as here) inadequately proved because of a later prosecutorial misstep unrelated to the suspect's questioning. Rather, *Miranda*'s rules were, as the Court often has said, put forth as "a series of recommended procedural safeguards," *Davis v. United States*, 512 U.S. at 457-458, that are "not themselves rights protected by the Constitution" and are "not constitutional in character," *Withrow v. Williams*, 507 U.S. 689, 690-691 (1993); *see Oregon v. Elstad*, 470 U.S. at 306-07. The *Miranda* rules "are preventative and do not . . . stem from violations of a constitutional right." *Arizona v. Roberson*, 486 U.S. 675, 691 (1988) (Kennedy, J., dissenting).

This view of *Miranda's* rules as judicially crafted safeguards rather than constitutional rights is no mere loose shorthand. The

holdings of three of the Court's most important *Miranda*-related cases rest directly on *Miranda's* non-constitutional status. In each of those cases, the Court allowed the admission into evidence of un-Mirandized but voluntary confessions. In *New York v. Quarles*, 467 U.S. 649, 654 (1984), the Court held that an incriminating statement obtained by police questioning of a rape suspect they had just captured was admissible despite the failure to give *Miranda* warnings. Similarly, in *Harris v. New York*, 401 U.S. 222, 224 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Court held that statements obtained in violation of *Miranda* could be used to impeach the testimony of a defendant who took the stand. The Court reasoned that the central truth-seeking purpose of the trial would be too far undermined if the defendant were permitted to keep from the jury his previous voluntary, though un-Mirandized, account.

The basis for these rulings was that *Miranda*'s exclusionary rule is not constitutionally required. Other considerations — including, significantly for purposes of this case, a reluctance to put the public safety at risk or to allow distortion of the truth — could take precedence over that rule, which rested on a *policy* decision by the *Miranda* majority to bolster the Fifth Amendment with an additional layer of protection. *See Quarles*, 467 U.S. at 658 n.7; *Hass*, 420 U.S. at 721-24; *Harris*, 401 U.S. at 224-26.

The competing theory of *Miranda*'s exclusionary rule is that un-Mirandized statements are excluded because the failure to give the suspect warnings means his statements are *necessarily* "compelled" as that term is used in the Fifth Amendment. *See* Pet. Br. at 19. This theory cannot be squared with these decisions. Under that reading, *any* use of an un-Mirandized statement at trial, including the ones allowed in *Quarles*, *Harris*, and *Hass* would also have to be barred, since those uses too would amount to "compelled" self-incriminating testimony. *See Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978); *New Jersey v. Portash*,

440 U.S. 450, 458-59 (1979).[4] Accordingly, the Court's admission of un-Mirandized statements in *Quarles*, *Harris*, and *Hass* proves that *Miranda*'s rule excluding unwarned but voluntary statements is not required by the Constitution.[5] That is the starting point from which to analyze Congress's authority to adopt Section 3501.

B. The *Miranda* Rules are Best Viewed as an Exercise of the Court's Power to Craft Safeguards for Constitutional Rights in the Absence of Legislative Action

The parties argue that the statute cannot stand because it adopts an approach different from what is said to be *Miranda's* constitutionally "based" regime. Conspicuously absent from this analysis is any specific explanation of what *Miranda's* constitutional "basis" is. Instead, the parties employ gossamer phrases to the effect that, for example, *Miranda* has "constitutional dimension,"

---

[4] While emphasizing at length the importance of stare decisis (*see* Pet. Br. at 30-45; Govt. Br. at 29-49), the parties fail to explain how, without overruling *Quarles*, *Harris* and *Hass*, the Court could conclude that the Constitution requires the suppression of an unwarned but voluntary statement. To pass off *Quarles* as the "public safety exception" to *Miranda* of course explains nothing. The question is not whether *Quarles* is such an "exception," but under what principle of law that or any exception is possible. *Miranda's* exclusionary rule is no more and no less "constitutionally based" when public safety is at stake than at any other time. And certainly neither public safety nor anything else could authorize the prosecution to use as evidence a statement obtained by what the Fifth Amendment actually forbids, namely compulsion. *See Mincey*, 437 U.S. at 398 ("*any* use criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law) (emphases in original).

[5] These three cases are by no means the only ones reaching such a conclusion. For example, another well-developed line of cases allows evidence derived from statements obtained in violation of *Miranda* to be used because *Miranda*'s "procedural safeguards were not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), and "may be triggered even in the absence of a Fifth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

Pet. Br. at 25, or that *Miranda* represented "an exercise of this Court's authority to implement and effectuate constitutional rights . . . ." Govt. Br at 6. A more determined effort to understand *Miranda*'s actual status demonstrates, however, that Section 3501 is compatible with *Miranda's* legal foundations. Accordingly, there is no need to overrule *Miranda* in order to uphold the statute.

Miranda's exclusionary rule is best understood as an exercise of the Court's authority to improvise measures to assist in the protection of constitutional rights where neither the Constitution nor the legislature has specified a particular mechanism for protecting those rights. *See, e.g., Bivens v. Six Unknown Agents*, 403 U. S. 388 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961).[6] The judicially devised regime may and sometimes does sweep more broadly than is strictly necessary to vindicate the right involved, *Bivens*, 403 U.S. at 397; *see also id.* at 406-08 (Harlan, J., concurring).[7] Because the Court has crafted such measures to protect constitutional rights against infringement by the states as well as the federal government, *see, e,g., Mapp*; *Bush v. Lucas*, 462 U.S. 367, 374-75 (1983), this understanding of *Miranda*'s exclusionary rule is consistent with its application to the states.

Since *Miranda*'s exclusionary rule is not a requirement of the Fifth Amendment, but is instead, in the mold of *Bivens*, an exercise of the Court's power to improvise a more sweeping, albeit prophylactic, measure designed to assist in protecting Fifth

---

[6] The search and seizure exclusionary rule is different from *Miranda's* because it is a remedy for *actual violations* of the Fourth Amendment. Adopting an analogous approach in the Fifth Amendment context would mean suppressing evidence only in cases in which a defendant's constitutional right against compelled self-incrimination has actually been violated. This is precisely the approach of Section 3501.

[7] The crafting of interim remedies not themselves required by the Constitution, but designed in the absence of legislation to assist in protecting constitutional rights, has become known as the exercise by the Court of the power to create "constitutional common law." *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 42 (1975).

Amendment rights, it follows that Congress had the authority to modify it. The existence of such authority is presumed throughout *Bivens* itself, for example, and lies at the heart of the Court's later holding in *Bush v. Lucas*, 462 U.S. 367 (1983). In that case, the Court refused to allow a *Bivens* remedy for money damages in an action by a federal employee for the government's breach of his First Amendment rights. The Court concluded the *Bivens* remedy was precluded because Congress had provided for a different remedy — not including money damages — through various federal personnel statutes. In *Bush*, the Court reached this conclusion while assuming that civil service remedies were *not* as fully effective as a *Bivens* remedy would be either in compensating the plaintiff or in deterring the unconstitutional exercise of authority by supervisors. 462 U.S. at 372-73, 377. According to the Court, the touchstone for assessing the constitutionality of the remedial regime Congress chose was not the judicially-devised regime for which it substituted. Rather, the touchstone was whether the congressional regime provided "meaningful" relief for the constitutional violation at issue. *Id.* at 368, 386. If it did, then how it compared to the judicially-devised scheme was irrelevant. *Id.* at 368, 386-90; *see also Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (remedial regime replacing judicially-devised one upheld because it contained "meaningful safeguards" for the constitutional rights at issue even though it failed to provide as "complete relief" as a *Bivens* remedy).

Analogously, in *Smith v. Robbins*, 120 S.Ct. 746 (2000), the Court upheld as constitutional a state scheme concerning withdrawal by appointed appellate counsel when faced with a frivolous appeal. The issue, the Court declared, was "what is constitutionally compelled," *id.* at 763, not how closely the state's procedure — indeed the only procedure — resembled the procedure the Court suggested in *Anders v. California*, 386 U.S. 738 (1967). The *Robbins* Court warned that "any view . . . that converted [the *Anders* procedure] from a suggestion into a straitjacket would contravene [our] established practice of allowing the States wide

discretion, subject to the minimum requirements of the [Constitution], to experiment with solutions to difficult policy problems." *Id.* at 750.

Like the regimes at issue in *Bush*, *Chilicky*, and *Robbins*, the modification to *Miranda's* automatic exclusionary rule that Congress adopted in Section 3501 is proper because it too fully protects the underlying constitutional right: the citizen's right not to be compelled to be a witness against himself. Indeed, it protects the underlying right more fully than the regime at issue in *Bush*, since in that case the Court assumed that the legislative remedy for the constitutional violation at issue was "less than complete." 462 U.S. at 373. That cannot be said of Section 3501: Under the statute, statements found for any reason to have been involuntary *are always* inadmissible, thereby preventing the defendant from incurring *any* constitutional harm under the Self-Incrimination Clause.[8]

Congress of course has no authority to modify the content of constitutional rights whether directly or under the guise of its remedial powers. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). By the same token, we assume it could not abrogate a judicially devised protective measure essential to the survival of a constitutional right. But that is very different from saying that Congress likewise has no authority to modify a ruling that "overprotects" a constitutional right, as is clearly the case with *Miranda*'s automatic rule excluding all unwarned statements. *See, e.g., Oregon v. Elstad*, 470 U.S. at 306 (*Miranda* "sweeps more broadly than the Fifth Amendment itself"); *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("the *Miranda* rule 'overprotects' the value at stake"). Overprotection *means* protection beyond what the Constitution requires. It is in precisely that area that Congress must be free to fashion or modify rules as it thinks wisest. *See Smith v.*

---

[8] *See United States v. Balsys*, 118 S.Ct. 2218, 2232 n.12 (1999) ("Although conduct by law enforcement officials prior to trial may ultimately impair [the Self-Incrimination] right, a constitutional violation occurs only at trial") (internal citation omitted).

Robbins, 120 S.Ct. at 763 ("We address not what is prudent or appropriate, but only what is constitutionally compelled") (internal quotation omitted); *cf. Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959).

Indeed, if Congress had no role in making independent judgments about what the law should be once constitutional requirements are satisfied, it is difficult to see that it would have any role at all. Rules required by the Constitution and rules beyond those required by the Constitution together exhaust the universe of rules. If the judicial branch is empowered to establish for all time the latter as well as the former, then there is nothing left for Congress to do. *Cf. Boerne*, 521 U.S. at 535-36 ("Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches.").

In considering the legislation that became Section 3501, Congress balanced the costs and benefits of a rule excluding all unwarned confessions against the costs and benefits of allowing the trial court to decide on the facts of each case whether the suspect spoke voluntarily. It knew what is obvious, namely, that a court is distinctly less likely to find an unwarned statement to have been voluntary, but that sometimes the court would decide that other circumstances proved the statement's voluntary character. It also knew that there would be some cases where allowing the jury to hear that statement would be the difference between successful and unsuccessful prosecution of a dangerous criminal. Finally, it understood the damage to public confidence in the criminal justice system, not to mention the risk to public safety, that results when the jury reaches the wrong result because it is not allowed to hear highly probative evidence.

Weighing all these considerations, Congress concluded that the cost of slightly less police deterrence — that is, marginally diminished deterrence resulting from the significant risk (as opposed to the certainty) of excluding an unwarned confession — was outweighed by the benefits of admitting such a confession, so long as it is voluntary. Because Congress' modification of *Miranda*'s extraconstitutional and overprotective exclusionary

rule continues to forbid in all instances the government's use of involuntary statements, it fully affords defendants their rights under the Fifth Amendment, and thus is constitutionally sound.

The parties' answer to this argument depends on clouding the distinction between constitutional requirements and nonconstitutional protective measures. The strategy of this response is carried off with a virtual army of seemingly refined phrases — "constitutionally rooted," "of constitutional dimension" and the like — used to characterize *Miranda's* status.[9] But these characterizations turn out to be not so much refinement as equivocation impersonating refinement. They do nothing to resolve, and in fact seem designed to obscure, the fundamental incoherence of the parties' position: admitting that confessions obtained in violation of *Miranda* do not always amount to compelled self-incrimination, but maintaining nonetheless that it is unconstitutional for Congress to permit the admission of such statements even if they have been shown to be voluntary.

The parties' position rests on the implicit assumption that courts, in order to provide an additional shield for the exercise of a constitutional right, have the authority to invalidate an Act of Congress even if it is fully adequate to protect against the actual violation of that right. That, however, is precisely the authority the Court refused to exercise in *Bush* and *Chilicky*. In those cases, the Court found that Congress was in a better position than the courts to evaluate the costs and benefits of differing approaches, *Bush*, 462 U.S. at 387-90, and that the Court had "no legal basis that would allow [it] to revise [Congress's] decisions." *Chilicky*, 487 U.S. at 429.

---

[9] The list is not unimpressive. We are, for example, told that the *Miranda* rules have "constitutional weight," "constitutional force," "constitutional underpinnings," "constitutional dimension," and "constitutional footings"; that they are "constitutionally based"; that they rest on "a constitutional basis," "a constitutional foundation," and "constitutional grounds"; and finally that they "implement and protect constitutional rights." Pet. Br. at 22, 23 25; Govt. Br. at 23, 25, Govt. Cert. Br. at 7-9, 16-17.

The same is true here. It is not possible through any feasible set of rules to assure that custodial questioning never becomes coercive. The only way to foreclose that possibility completely would be to prohibit custodial questioning altogether, just as the only way to provide complete assurance against violations of defendants' rights at trial would be to prohibit all prosecutions. The *Miranda* Court declined to impose either prohibition, and with good reason.

Because perfection is not possible, the effectiveness of laws intended to decrease the number of constitutional violations, the estimation of how many there are to be decreased, and the assessment of the cost to other values that one preventive rule or another is likely to impose, are necessarily matters of judgment and degree. "Congressional competence at 'balancing governmental efficiency and the rights of [individuals],' . . . is no more questionable" in the context of custodial interrogations than in other settings. *See Chilicky*, 487 U.S. at 425, *quoting Bush*, 462 U.S. at 389 (internal citation omitted); *see also Palermo*, 360 U.S. at 343 n.11 (discovery rules for criminal defendants). Accordingly, there is no more basis for disturbing Congress's judgment as to what measures are best designed to effectuate that balance fairly in this instance than there was in *Bush* or *Chilicky*.

C. The Application of *Miranda's* Rules in State Cases Does Not Demonstrate that the Rules are Constitutional Requirements

The parties acknowledge the Court's repeated statements that *Miranda's* rules are not themselves required by the Constitution and are not constitutional in character. Pet. Br. at 22-24; Govt. Br. at 21-26. They nonetheless contend that *Miranda*'s application to the States by implication must mean that the rules *are* constitutional in character.

The parties' contention on this point requires disregarding much of what the Court has said in numerous state cases concerning *Miranda*'s non-constitutional status in favor of an implication

concerning an issue that the parties in those cases did not even raise. The implication seems dubious for that reason alone. It would be unusual for the Court to have considered that issue *sua sponte* in reviewing the state cases, given its normal disinclination to go beyond the issues that the parties have presented. *See, e.g.*, *Michigan v. Mosley*, 423 U.S. 96, 100 (1975) ("Neither party in the present case challenges the continued validity of the *Miranda* decision . . . ."); *Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting) ("we have not been called upon to reconsider *Edwards* . . . .").

In any event, the implication about *Miranda*'s status that the parties seek to draw cannot be reconciled with the holdings of many of the very state cases they cite. As explained, *supra*, at pp. 8-9, the Court's decision to admit un-Mirandized but voluntary statements in *Quarles*, *Harris*, and *Hass*, all three of which were state cases, *turned* on the non-constitutional status of *Miranda*'s exclusionary rule. Similarly, the decision in *Oregon v. Elstad*, to admit a confession that was the fruit of an un-Mirandized earlier statement rests squarely on the ground that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." 470 U.S. at 306 n.1.[10]

---

[10] The parties collect general language in several cases referring to the *Miranda* rules in constitutional terms. *See, e.g.*, Pet. Br. at 20 & n.9; Govt. Br. at 24-25. Such language is invariably dicta, however, set out in contexts in which the constitutional or nonconstitutional character of the rules was not an issue and no greater precision in expression was called for. None of the dicta purports to supersede more detailed statements about *Miranda*'s non-constitutional status in, for example, *Quarles* and *Elstad*, which is clearly part of the logic and holding of these decisions. Numerous other statements are to similar effect *See, e.g., Davis v. United States*, 512 U.S. 452, 457 (1994) (*Miranda* rights are "not themselves rights protected by the Constitution") (internal citation omitted); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (*Miranda* rules are "not themselves rights protected in the Constitution") (internal citation omitted); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from government compulsion"); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) ("As is now well established, the *Miranda* warnings

If the holdings in these cases are still good law, the most that could follow from the state review cases is that, in the absence of legislation taking a different approach, the Court has some authority to impose on the states nonconstitutional measures designed to protect constitutional rights. Of course we have not disputed that this is so. To the contrary, that theory lies at the heart of our explanation of the legal basis of *Miranda* as a form of constitutional common law — an explanation to which the parties fail to provide a coherent alternative.

To be sure, *Miranda*'s application to the States despite the fact that its rules are not constitutionally required implies that the Court has some authority to impose on the States measures that are not strictly constitutionally necessary, but are designed to assist in enforcing constitutional rights. This, of course, is hardly the revolutionary proposition the parties suggest. It is consistent with what the *Miranda* Court itself said on the subject, since for whatever else is in dispute about the decision, it is at a minimum clear that the Court believed that its specific rules were not constitutionally mandated and could be legislatively superseded by others. Thus, the recognition that the Court could impose nonconstitutional rules in the review of state cases provides no basis for the further step of inferring that Congress has no authority to modify those rules in federal jurisdiction.

Miranda is not the only instance in which the Court has found that it has this power. In addition to the cases discussed, *supra*, at pp. 10-12, the Court has engaged in a similar task in several other areas. One illustration is the Act of State doctrine, which bars federal and state courts from inquiring into the validity of the public acts of foreign governments. As explained in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964):

> The text of the Constitution does not require the act of state doctrine . . . . The act of state doctrine does,

---

are not themselves rights protected by the Constitution") (internal quotation omitted).

> however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers . . . . [T]here are enclaves of federal judge-made law which bind the States . . . . [T]he act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution . . . .

376 U.S. at 423-24, 426-27. Like the *Miranda* rules, the Act of State doctrine is also subject to revision and restriction by Congress as a judicially developed, nonconstitutional rule, even while the Court's authority to craft it in the first instance is not seriously in doubt. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 180-81 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).[11]

This in turn means that language in some cases outside the *Miranda* context that seems to suggest that the Court uniformly lacks the authority to impose nonconstitutional measures on the States has been overly broad.[12] Such language perhaps should

[11] Another illustration is the dormant commerce clause doctrine. This doctrine furthers the constitutional "right to engage in interstate trade," *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (internal quotations omitted), by invalidating state laws that unduly burden or interfere with such commerce. The Court's decisions in this area are certainly "constitutionally based" on the Commerce Clause. Nonetheless, Congress is free to validate state actions that would otherwise be prohibited under the Court's decisions. *See, e.g., Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174-75 (1985); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 436 (1856).

[12] Many of these statements are also susceptible to more than one reading. For example, *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991), indicates that the Court's power over the states "is limited to *enforcing* the commands of the United States Constitution" (emphasis added). Of course, if the Court can "enforce" constitutional commands with non-constitutional prophylactic rules, as the *Miranda* doctrine indicates, then this statement provides no basis for concluding that the *Miranda* rules are somehow constitutionally required.

be read to be limited to circumstances where the measures being advocated are not sufficiently connected to the enforcement of a constitutional provision. That was the distinction the Court suggested in *Moran v. Burbine*, 475 U.S. 412 (1986). There the Court drew a line between *Miranda*'s prophylactic measures, which in its view could permissibly be imposed on the States — not because they were constitutionally required but because they were sufficiently closely connected to the protection of Fifth Amendment rights — and the rule the defendant was urging. *See id.* at 424-25. That rule would have excluded statements on account of police deception of an attorney seeking to represent a suspect who had agreed to talk voluntarily. The Court held that it could not impose that rule, because its lack of connection to the Fifth Amendment meant that its imposition would cross the line between a permissible prophylactic measure and an impermissible supervisory power exercise.[13]

[13] As a final argument supporting the constitutional character of the *Miranda* regime, the parties claim that it is analogous to various other rules promulgated by the Court that are said to "sweep more broadly than the constitutional right upon which they are based." Govt. Br. at 44; *see* Pet. Br. at 25-27. With one irrelevant exception, these analogies prove nothing of the sort. Instead, the cited rules, while prophylactic in the sense that they instrumentally guard against various evils, are constitutional *requirements* of the Due Process Clause or other constitutional provisions. *See generally* Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 188-89 (1988). For instance, it may be true that the evil guarded against by *North Carolina v. Pearce*, 395 U.S. 711 (1969) — vindictive increases in sentences and defendants' inhibitions from the fear of such increases — would not invariably occur otherwise. Nonetheless, the Court has held that, where the risk of the threatened evil is sufficiently grave, measures to prevent them must be observed as a matter of constitutional due process. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (holding that *Pearce* applies in two-tiered system because "[d]ue process of law *requires* that such a potential for vindictiveness must not enter into" the system) (emphasis added). In contrast, the *Miranda* rules cannot be understood as a due process requirement on a par with *Pearce*, because the Constitution does not bar the admission of un-Mirandized but voluntary statements.

The irrelevant example provided by the parties is *Michigan v.*

D. The Application of *Miranda's* Rules in Habeas Proceedings Does Not Demonstrate that The Rules Are Constitutional Requirements

The parties also claim that the application of the *Miranda* rules in habeas proceedings, s*ee Withrow v. Williams*, 507 U.S. 689 (1993), demonstrates that the rules are constitutional requirements. In *Withrow*, Dickerson asserts, the Court "rejected the government's argument that since the *Miranda* rules are not constitutional in character, but merely 'prophylactic,' federal habeas review should not extend to claims based on violations of these rules. *Withrow*, 507 U.S. at 690." Pet. Br. at 22 (internal quotation omitted).

This is true as far as it goes. What Dickerson neglects to mention, however, is that the Court made clear it was rejecting *not* the government's *premise* about the non-constitutional status of the *Miranda* rules, but rather the *consequence* the government argued flowed from that premise. The full paragraph reads as follows:

> Petitioner, supported by the United States as *amicus curiae*, argues that *Miranda*'s safeguards are not constitutional in character, but merely "prophylactic," and that in consequence habeas review should not extend to a claim that a state conviction rests on statements obtained in the absence of these safeguards. *We accept petitioner's premise for purposes of this case, but not her conclusion.*

507 U.S. at 691 (emphasis added). Moreover, also contrary to what Dickerson's brief suggests, the Court did not reject that conclusion for purposes of determining whether *Miranda* violations

---

Jackson, 475 U.S. 625 (1986). But that case "simply superimpos[es] the Fifth Amendment analysis of *Edwards* [and related *Miranda* doctrine] onto the Sixth Amendment." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). Because the *Jackson* rules are merely an offshoot of *Miranda*, they provide no independent guidance on interpreting the *Miranda* rules.

provided a sufficient *jurisdictional* basis for a habeas claim, a point petitioner declined to press at argument.[14] Rather, the question the Court decided was on what basis habeas review of such claims should proceed: under ordinary habeas standards, or the judicially-created rule of *Stone v. Powell*, 428 U.S. 465 (1976), imposing special extra-statutory limitations on review of Fourth Amendment habeas challenges.

This leaves the parties to argue that, despite its statement to the contrary, the *Withrow* Court must nevertheless have implicitly decided that the *Miranda* rules were constitutional; otherwise, instead of reaching the merits, the Court should have reversed the district court on jurisdictional grounds. This must be so, according to the parties, because federal habeas review of state court decisions is available only for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. 2254(a). In their view, a *Miranda* violation "certainly does not involve laws or treaties," Pet. Br. at 22; *see* Govt. Br. at 24. Therefore, the only theory on which *Miranda* claims could be cognizable on habeas is if a *Miranda* violation were a violation of the Constitution.

As with their argument about *Miranda*'s application to the States, this means that once again the parties are arguing that the true holding of *Withrow* is the opposite of what the Court said was the premise of that holding. And as with that argument as well, the parties ignore an easy reconciling solution.

Contrary to the parties' hasty dismissal of the possibility, it seems far more likely that the Court's implicit finding of jurisdiction in *Withrow* rests on the proposition that *Miranda*, while not part of the Constitution, is part of the "laws of the United States," which for purposes of Section 2254(a), includes not only federal statutes but also decisional law designed to help effectuate the federal Constitution or statutes. *See generally* LARRY W. YACKLE, POST CONVICTION REMEDIES § 97, at 371 (1981 & 1996 Supp.) (concluding *Miranda* rules can be viewed as "federal 'law'

---

[14] *See Withrow v. Williams*, No. 91-1030, tr. of oral argument at 12.

which, under the [habeas] statute, may form the basis for habeas relief"). That view was the one taken on the question at the time by the Department of Justice;[15] it accords with the interpretation the Court has given of the same phrase used in a similar context in the federal question jurisdictional statute, 28 U.S.C. 1331, *see National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850-51 (1985) (federal common law as articulated in rules that are fashioned by court decisions constitutes "laws" as that term is used in Section 1331); and it parallels the construction the Court gave to the words "laws of the several States" to include state decisional law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, the cognizability of *Miranda* violations on habeas provides no basis for concluding that *Miranda*'s exclusionary rule is constitutionally required or immune from legislative modification.

E. Considerations of Stare Decisis Support Upholding Section 3501

Since, as the Court has held repeatedly, the *Miranda* rules are nonconstitutional, there is no need to overrule *Miranda* to uphold Section 3501. Rather, if the Court affirms the judgment below, it will ratify a statute that supersedes nonconstitutional case law rules while continuing to preserve both the constitutional right itself and the courts' ability to enforce that right. There is no affront to stare decisis in doing so, only a recognition that Congress has the final say on matters that the Constitution does not resolve.

On the other hand, holding Section 3501 unconstitutional could not avoid creating serious stare decisis difficulties. It would require overruling *Quarles*, *Harris*, *Hass*, and *Elstad* for starters, and indeed every one of the Court's cases whose judgment has

---

[15] When *Withrow* was argued, the Deputy Solicitor General told the Court directly that *Miranda* could indeed be viewed as a "law" of the United States under the habeas statute. *See Withrow v. Williams*, No. 91-1030, tr. of oral argument at 15-16.

depended on the long-held view that *Miranda* provides only "a series of recommended procedural safeguards." *Tucker*, 417 U.S. at 444. It would also require the Court to retract statements in two recent cases that Section 3501 is "the statute governing the admissibility of confessions in federal prosecutions." *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994) (upholding Section 3501(c)).[16]

The most one could say for the parties' argument is that the *Miranda* decision in some places apparently indicated that actual compulsion in violation of the Fifth Amendment necessarily occurs unless the *Miranda* procedures or other equally restrictive procedures are observed in custodial questioning. *See* 384 U.S. at 457-58, 467-74. As we have shown, however, this view was abandoned years ago. Hence, any "overruling" of the aspect of *Miranda* which might have implied immunity from legislative modification has already happened. As the government has conceded, "The Court has retreated from [the inherent compulsion] aspect of its reasoning in *Miranda*." Govt. Cert. Br. at 13-14; *see also Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (it weighs against following a precedent if "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine").[17]

---

[16] The statement in *Alvarez-Sanchez* came at the urging of the government. *See* Br. for the U.S. at 32, *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) (No. 92-1812) (urging the admission of a confession under Section 3501(c) and explaining that Section 3501(a) "requires the admission" of voluntary statements). In its earlier submission to the Court, the government did not address any of the complex severability issues that arise under its current position that the major provision of the statute is actually unconstitutional.

[17] It is also interesting that government asserts in its brief that for many years the *Miranda* rules have been stable, clear, and helpful to law enforcement, *see* Govt. Br. at 35, while in a footnote it reports that "[i]n many respects, the Court has tailored the *Miranda* doctrine as necessary to make it more workable." *Id.* at 35, n.25. A rule that has been changed

F. Policy Considerations Support Upholding Section 3501

Since stare decisis does not support the parties' attack on Section 3501, their accompanying analysis of policy considerations that allegedly support the *Miranda* rules is just that and nothing more: arguments of an essentially legislative nature as to why the *Miranda* rules are beneficial. In our constitutional system, arguments of this type are properly addressed to the legislature and afford no basis for invalidating a statute which is consistent with the Constitution.

Moreover, even considered on their own terms, the parties' arguments are unpersuasive. Even if it were true that *Miranda*'s procedures are on the whole beneficial to law enforcement, a question we address momentarily, it would not advance the parties' cause. First, for obvious reasons the parties do not even purport to say that *Miranda*'s automatic exclusionary rule, the only aspect of *Miranda* directly before the Court, has such beneficial effects. Second, nothing in 18 U.S.C. 3501 prevents or discourages law enforcement agencies from continuing to give *Miranda* warnings. As to the government's suggestion that *Miranda* is not a problem for federal law enforcement agencies, the overwhelming support for the court of appeals' decision by prosecutors and law enforcement organizations who have filed amicus briefs in this case – including representatives of federal law enforcement agents – suggests otherwise.

Indeed, contrary to the impression conveyed in the government's brief, the actual views of federal law enforcement agencies that have been lodged with the Court reveal serious difficulties with *Miranda*'s automatic exclusionary rule. While the brief reports that "federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations," Govt. Br. at 34, that conclusion appears to rest on the position of such agencies as the Internal Revenue

---

in "many respects" is not the strongest candidate for rigorous application of stare decisis, and the frequent changes themselves attest to the problems *Miranda* creates.

Service and the Customs Service, which typically conduct non-custodial interviews, to which *Miranda* is inapplicable. *See, e.g., Beckwith v. United States*, 425 U.S. 341 (1976); *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997), *cert. denied*, 522 U.S. 1065 (1998). On the other hand, the Drug Enforcement Administration, which perhaps conducts a higher percentage of custodial interrogations than any other federal agency, concluded that the "methods used by DEA to investigate drug organizations highlight the need to reform the formal, prophylactic requirements of *Miranda*." Letter from Richard A. Fiano, DEA's Chief of Operations, to Frank A.S. Campbell (Oct. 13, 1999).[18] Similarly, the FBI reports that offshoots of the *Miranda* requirements, such as the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), have had "an impact on numerous FBI investigations." Letter from Larry R. Parkinson to Eleanor D. Acheson (Oct. 19, 1999). Moreover, while the government cannot conceal the fact that it opposed the *Miranda* rules at their inception, *see* Govt. Br. at 48 n.36, it neglects to mention that the Department has for many years supported the constitutionality of Section 3501. *See DOJ Report, supra*, 22 U. MICH. J.L. REF. at 520-21; Paul G. Cassell,

---

[18] The Solicitor General lodged this correspondence with the Court on February 24, 2000. Curiously, one of the lodged documents is a letter from the DEA General Counsel's Office written just two days before the lodging. While supporting Section 3501, that letter conflicts in important respects with the views quoted above by DEA's Chief of Operations, Richard A. Fiano, which were written well before the filing of the government's brief. It should be noted that the DEA General Counsel's letter was written only *after* two United States Senators had attempted to obtain from the Justice Department the earlier written views of the DEA supporting Section 3501. *See* 146 CONG. REC. S760-02 (Feb. 24, 2000) (statement of Sen. Thurmond) (raising questions about why DEA's previous written position was not referenced in the Department's brief to the Court). Undersigned counsel also wrote the Department, seeking information about the views of the United States Attorneys in addition to the other law enforcement components whose opinions the Department has selected for disclosure. The Department, however, has declined to provide those views. So that the record may be complete on these issues, we will lodge this correspondence with the Court.

The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda, 85 IOWA L. REV. 175, 197-203 (1999); *see also United States v. Crocker*, 510 F.2d 1129,1136-38 (10th Cir. 1975) (upholding statute at government request).

Even apart from this information, the government's own brief admits that the *Miranda* system has harmed federal law enforcement, but claims those harms, which it avoids detailing, can be dealt with by other means. Stripped of euphemism, the government's position appears to be essentially as follows: (1) The Court should hold Section 3501 unconstitutional, thereby perpetuating *Miranda* in all respects; (2) The Court should thereafter ameliorate the harm resulting from its refusal to uphold the statute by overruling or modifying such decisions as *Edwards v. Arizona*, 451 U.S. 477 (1981). Govt. Br. at 35 (discussing considerations that would apply "should the Court be faced with reconsideration" of *Edwards* other cases); and (3) The Court should perhaps, in the future, further ameliorate the harm resulting from its refusal to uphold the statute by adopting a "good faith" exception to *Miranda*. Govt. Br. at 36 n.26.

Obviously, upholding Section 3501 would resolve the problems identified by the government. In contrast, the government's approach would require a repudiation of the current precedents in order to invalidate Section 3501, and would then require an overruling of additional precedents to deal with the resulting harm to law enforcement. As an approach supposedly dictated by respect for stare decisis, the course urged by the government is, to say the least, peculiar.

A final point about the Department's claim that *Miranda* has not harmed law enforcement is that Congress — the branch empowered to make such factual determinations — disagrees. After extensive hearings on *Miranda*'s real world effects, the Senate Judiciary Committee recommended adoption of Section 3501 because "the rigid and inflexible requirements of the majority opinion in the *Miranda* case are . . . extremely harmful to law enforcement." S. REP. 90-1097, 90th Cong., 2d Sess. at 46, *reprinted in* 1968 U.S.C.C.A.N. at 2132. This finding on an

"essentially factual issue" is "of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

If Congress's factual finding is correct, as the Court must assume, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion),[19] many dangerous criminals are escaping justice in the teeth of a federal statute that would permit their successful prosecution. And this stands to reason. Over time, a rule that automatically excludes voluntary confessions whenever there is a deviation from the *Miranda* regime is going to exact a significant toll on the system. The Court has recognized, for example, that "the task of defining 'custody' [under *Miranda*] is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Oregon v. Elstad*, 470 U.S. 298, 309 (1985).[20] One of the most worthwhile

---

[19] Recent empirical scholarship also supports the congressional conclusion. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (precipitous drop in FBI crime clearance rates after *Miranda*, as shown in Appendix A to this brief); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996) (before-and-after *Miranda* studies show drop in confession rates); *see also* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871-76 (1994) (similar findings).

[20] The difficulties in defining "custody" should be enough to demonstrate that *Miranda*'s "bright line" rules are blurry and that, if anything, the *Miranda* rules actually increase litigation. Under *Miranda*, a federal court must determine (if requested by the defendant) both (1) *Miranda* compliance (including a determination that the suspect "voluntarily" waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369, 373 (1979)) *and* (2) the ultimate voluntariness of the statement. Even if the officer complied with *Miranda*, the Court must still consider a defendant's voluntariness arguments. *See Withrow v. Williams*, 507 U.S. 680, 693 (1993) (concluding "virtually all *Miranda* claims" can "simply be recast" as voluntariness arguments). On the other hand, if the officer

aspects of the statute is that it does not punish society when the officer fails to adhere to every aspect of *Miranda's* requirements but nonetheless treats the suspect in a way that assures courts — as both courts below felt assured — that the suspect's statement was voluntary. Thus, to the extent public policy considerations are relevant to the Court's conclusion, they support upholding Section 3501.

II. EVEN IF THE COURT IS EMPOWERED TO DEMAND SOME LEVEL OF PROPHYLAXIS BEYOND CONSTITUTIONAL REQUIREMENTS, SECTION 3501, TAKEN TOGETHER WITH OTHER PROVISIONS OF LAW, PROVIDES ADEQUATE PROTECTION

We have argued up to now that Section 3501 is a valid exercise of Congress' authority to modify *Miranda*'s extra-constitutional exclusionary rule. The parties disagree, effectively maintaining that Section 3501 is invalid because it violates a rule that in some sense is constitutional, and that even if Congress has a proper role, this particular statute fails to satisfy some additional requirement of prophylactic adequacy. Pet. Br. at 28-29; Govt. Br. at 27-29.

In this section, we demonstrate that the statute, taken together with the legal landscape that surrounds it, provides more than adequate protection to safeguard suspects from police compulsion. A word is useful at the outset, however, to address the premise of the parties' claim.

---

violated *Miranda*, the court must typically still determine the voluntariness of the statement, since this governs its use for impeachment and derivative evidence purposes. Thus, the *Miranda* rules do not reduce the burden on the courts. *See DOJ Report*, *supra*, 22 U. MICH. J.L. REF. at 547-48 ("[There] is no reason to believe that [*Miranda*] has had any effect of reducing the volume of litigation relating to the admission of pretrial statements by defendants").

That premise is that the Constitution requires more than the Constitution requires. In particular, what the parties seek by insisting on *some* protection beyond the Constitution's text is for the Court to rewrite the Fifth Amendment to require the police *affirmatively to assist* the suspect in making what they view as a more enlightened, or at least a shrewder, decision about whether to talk. Imposing such an obligation on the police arguably would be a good idea; it would appeal to some as improving the fairness of the process, although it would disturb others as going too far in handicapping unobjectionable police work. In other words, it is precisely the sort of reasonably debatable policy choice that, because of its extraconstitutional character, is properly committed to popular, rather than judicial, judgment.

And that, we believe, is the crucial point for purposes of this case. For whatever else may be said of it, any obligation *affirmatively to assist* a suspect is not even arguably required by the Fifth Amendment as the Framers wrote it.[21] The Fifth Amendment simply forbids the police from *compelling* the suspect to talk. In other words, it prevents the police from in any way forcing, but not from causing, a confession. Causation can, certainly, escalate to the point of compulsion, but the parties have produced no evidence that this happens typically or even particularly frequently. When it does, Section 3501 provides the courts with the means to ferret it out and, by suppressing a statement that is *for any reason* found to be involuntary, deny the police any advantage they might have hoped to achieve by such behavior.

---

[21] The same is true of the Fourth Amendment's ban on unreasonable searches. For example, the police need not inform a suspect of his right to refuse consent to a search, notwithstanding that the results of a search may be as thoroughly incriminating as a confession. Although where the suspect is in custody, his unwarned consent to the search should receive heightened scrutiny, it can nontheless be valid so long as it is voluntary under all the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227-47 (1973). Section 3501 virtually replicates this standard in the Fifth Amendment context.

Society might conclude that, notwithstanding the absence of a Fifth Amendment violation, a suspect's unwarned confession *should* be suppressed. Some states might decide — indeed several have already decided — that a failure to give warnings *does* warrant automatic suppression.[22] Others might adopt the middle course Congress chose in Section 3501, in which warnings are pointedly encouraged, but a failure to give them does not automatically require suppression. ARIZ. REV. STAT. ANN. § 13-3988. Still other states might opt, for example, to require video or audio recording; *see Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 591-93 (Minn. 1994), or to insure that any questioning be undertaken only in the presence of magistrate, *see* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 77 (1997). But we believe it beyond the proper reach of judicial authority and judicial competence, *see Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985), to ossify as a constitutional mandate any of these extraconstitutional policy choices.

In any event, Section 3501 — read in combination with other bodies of law providing criminal, civil, and administrative sanctions for coercion during interrogation, along with the Fifth Amendment's own exclusionary rule banning use of compelled statements — leaves in place a significant degree of protection for the exercise of a suspect's rights.

A. Section 3501 Contains Protective Measures Against Compelled Confessions

Section 3501 preserves much of the prophylactic value of *Miranda*'s exclusionary rule, albeit through a different and more refined mechanism. The statute requires that in making the voluntariness determination, the court "shall take into

---

[22] *See, e.g.*, La. Const. Art. I, § 13. *See generally* BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW 1995 & 1999 Supp.) §§ 4.1 - 4.18 (describing independent state approaches to aspects of *Miranda* doctrine).

consideration all the circumstances surrounding the giving of the confession." 18 U.S.C. 3501(b). The statute also, however, specifically enumerates five factors that courts *must* consider. Among the most prominent of these is whether the suspect received *Miranda* warnings.

Specifically, Section 3501 directs the courts to consider the following when making voluntariness determinations:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, *(3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel;* and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. 3501(b) (emphasis added).

The prominence that *Miranda* warnings enjoy in Section 3501 means that, if the Court upholds the statute, federal law enforcement officers will almost certainly continue to give them. They will do so for much the same reason as they do so now: self interest. Taking this precautionary measure will assist in obtaining a favorable ruling on the admissibility of the statement at trial, whereas failing to do so will make such a decision much less likely. *See Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (Mirandized statements rarely found to be involuntary). Therefore, it is not surprising that in a footnote at the very end of its brief, the Department of Justice states categorically that whether *Miranda* or Section 3501 is the law, "Federal law enforcement agencies would, as a matter of policy, continue to comply with the warnings requirements of *Miranda*." *See* Govt.

Br. at 49 n.37.[23] This assurance provides real-world confirmation for the view of the court below that "nothing [in the statutory standard] provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings." J.A. 210. What is most likely to happen is that rather than reading warnings from *Miranda* cards, officers will read them from Section 3501 cards.

The parties nevertheless suggest that Section 3501 adds nothing to pre-*Miranda* law on the warnings question, citing various pre-*Miranda* cases in which courts also considered the presence or absence of warnings as a factor in voluntariness determinations. *See* Govt. Br. at 16 n.11. But at most all those cases show is that before *Miranda*, whether warnings were given was relevant evidence of voluntariness if the parties sought to have the court consider it. There is a significant difference between the prophylactic value of that occasionally vigilant system, and the rule of Section 3501, under which the judge *must consider in every case* whether the warnings were given. The incentives to warn that Section 3501 provides are much stronger than those in pre-*Miranda* law, since under the statute officers know that in every federal criminal prosecution the giving of the warnings will be an issue.

Section 3501 provides greater protection to suspects than pre-*Miranda* law in other ways as well. *See* FRED GRAHAM, THE SELF-INFLICTED WOUND 324 (1970) ("parts of [Section 3501]

---

[23] This point alone creates considerable doubt about the parties' appeal to "transcend[ent]" factors as weighing against Section 3501, namely the "unique and important role" *Miranda* is said to have come to play in the nation's criminal justice system. Govt. Br. at 49; *see* Pet. Br. at 44. The subtext of this argument is that Section 3501 will be the death knell for *Miranda* warnings. Yet any federal officer who fails to give warnings will be taking a remarkably foolish risk, endangering the usefulness of the whole enterprise of questioning the suspect. Moreover, although state cases are not at issue here, the nation's leading law enforcement groups have filed *amicus* briefs indicating that they would continue to give *Miranda* warnings should the Section 3501 standards become applicable to their state officers.

would have been a progressive expansion of suspect's rights if Congress had passed it prior to *Miranda*"). Indeed, in at least one respect, Section 3501 extends protection beyond *Miranda* and current voluntariness caselaw standards. The statute directs the district court to consider whether the "defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession." 18 U.S.C. 3501(b)(2). Under current law, no such inquiry is relevant in order to assess the voluntariness of a suspect's confession. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987) (suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege).[24]

Contrary to the parties' claims, then, Section 3501 does not simply return the law of custodial interrogation to its pre-*Miranda* status. Rather, through the incentives it creates, it preserves the best prophylactic features of *Miranda* while eliminating its worst and most socially damaging rigidities. It thus produces a "win-win" regime, under which federal law enforcement officers will continue to deliver *Miranda* warnings to suspects, while in cases with technical disputes over *Miranda*

---

[24] The government concedes that a suspect's awareness of charges "received less attention in this Court's pre-*Miranda* confession cases," Govt. Br. at 17, but claims that this factor was "referred to" in one case. *Id.* (citing *Harris v. South Carolina*, 338 U.S. 68, 69 (1949)). The government's brief inaccurately cites this reference as coming from a decision of the Court, rather than a mere *plurality* opinion. *See* 338 U.S. at 69 (Frankfurter, J. writing for three members of the Court); *id.* at 72 (Douglas, J., concurring). Thus, the government is unable to find even a single decision of this Court substantively discussing this factor as part of the pre- (or post-) *Miranda* voluntariness decisions. Clearly, then, some suspects will receive more protection under Section 3501 than under *Miranda* — *e.g.*, the respondent in *Colorado v. Spring*; *see also State v. Randolph*, 370 S.W.2d 741 (W. Va. 1988) (rejecting *Spring* under state law and suppressing confession because suspect not aware of suspected charges). Moreover, it is plausible that law enforcement agencies would respond to a favorable decision on Section 3501 by adding an additional warning to their "*Miranda*" cards addressing this point.

compliance (this case being a prime example, *see* J.A. 180-84), the suspect's statement will be admitted if, but only if, it is voluntary.

B. Other Protective Measures Against Compelled Confessions Have Expanded Considerably Since 1966

The interrogation practices of federal law enforcement officers are addressed not only in Section 3501, but also by other federal statutes and related bodies of law holding out the possibility of civil, criminal, and administrative penalties against officers who coerce suspects. Almost all this law was created or significantly expanded after *Miranda*. Thus, the legal incentives for non-coercive police questioning today are almost unrecognizably greater than when *Miranda* was decided.

Since 1966, civil penalties against federal officers who violate constitutional rights have become available. When *Miranda* was written, it was quite difficult as a practical matter to obtain damages in federal court from federal law enforcement officers who violated Fifth Amendment rights. *See Bell v. Hood*, 327 U.S. 678 (1946). That changed in 1971, with *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which the Court held that a complaint alleging that the Fourth Amendment had been violated by federal agents acting under color of their authority gives rise to a federal cause of action. Since then, courts have held that *Bivens* actions apply to abusive police interrogations. *See, e.g., Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (allowing a *Bivens* claim under the Due Process Clause for police misconduct during custodial interrogation).

Likewise, when *Miranda* was decided, the federal government was effectively exempt from civil suits arising out of Fifth Amendment violations. At the time, sovereign immunity barred recovery for many intentional torts which might normally form the basis for such suits. *See* S. REP. NO. 93-588, *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791. After *Miranda*, Congress acted to provide that the federal government is civilly liable for

damages for conduct that could implicate Fifth Amendment concerns. In 1974, Congress amended the Federal Tort Claims Act to make it applicable "to acts or omissions of investigative or law enforcement officers of the United States Government" on any subsequent claim arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h).

Supplementing these expansions of civil liability for coerced confessions is the enforcement of criminal law in the area. Thus, 18 U.S.C. 241 and 242 prohibit the deprivation of constitutional rights under color of law. While Congress adopted these statutes during the Reconstruction Era, post-*Miranda* cases now make clear these statutes apply to federal law enforcement officers, *United States v. Otherson*, 637 F.2d 1276, 1278-79 (9th Cir. 1980), who obtain coerced confessions, *see United States v. Lanier*, 520 U.S. 259, 271 (1997) (noting that "beating to obtain a confession plainly violates § 242") (internal citation omitted). Also, the Justice Department's Civil Rights Division and the FBI now more effectively support enforcement of these statutes against federal officials. *See generally* 28 C.F.R. § 0.50 (establishing Justice Department's Civil Rights Division).

Also, just last year, Congress adopted legislation requiring federal prosecutors (and, by extension, agents acting as their proxies) to comply with the state rules of ethics in the jurisdictions in which they practice. 28 U.S.C. 530B. A number of state ethics rules forbid contact with suspects who are represented by counsel, even during preliminary stages of an investigation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2. The effect of Congress' action is to create a hybrid federal-state prophylactic rule restricting the opportunities for federal investigators to question suspects in ways that can extend well beyond *Miranda's* requirements. *Cf. Moran v. Burbine*, 475 U.S. 412 (1986).[25]

---

[25] The provisions are highly controversial. *See, e.g., Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts of the House Judiciary Comm.*, 104th Cong., 2d Sess. 49 (1996) (statement of then-Associate Deputy Attorney Gen. Seth P.

The government also admits that the risk of Fifth Amendment violations is now less than at the time of the *Miranda* decision, acknowledging that "law enforcement agents today are generally better trained than they were in 1966." U.S. Br. at 48. This is, of course, only a part of the picture. As the Department of Justice has more fully explained in connection with the Fourth Amendment exclusionary rule, devices for preventing constitutional violations include not only better training but also

> specific rules and regulations governing the conduct of employees, and the use of investigative techniques such as searches and seizures; . . . institutional arrangements for conducting internal investigations of alleged violations of the rules and regulations; and . . . disciplinary measures that may be imposed for unlawful or improper conduct.

Dept. of Justice Office of Legal Policy, Report to the Attorney General on the Search and Seizure Exclusionary Rule, reprinted in 22 U. MICH. J.L. REF. 573, 622 (1989).

Finally, it is important to remember that the Fifth Amendment itself provides its own exclusionary remedy. Actual violations of the Fifth Amendment, as opposed to "technical *Miranda* violation[s]," *Quarles*, 467 U.S. at 668, will always lead to the exclusion of evidence.[26]

Waxman) (restrictions have "the potential to wreak havoc on federal law enforcement efforts"). Efforts are underway in Congress to amend or even repeal them. The provisions are significant, however, because they demonstrate Congress fully considers the need to protect criminal suspects in crafting legislation.

[26] While Section 3501 does not directly affect state cases, similar points can be made in relation to the adequacy of remedies and deterrents there. Available remedies and sanctions for actual Fifth Amendment violations by state officers include the constitutional exclusionary sanction, suits under 42 U.S.C. 1983 (which has been expansively interpreted since 1966), state tort suits, and criminal prosecution under 18 U.S.C. §§ 241, 242. In addition, if there is reasonable cause to believe that a pattern or practice of Fifth Amendment violations exists in a state or local law

C. Section 3501, Combined with Civil Rights Actions and Other Remedies, Creates a Constitutionally Adequate Alternative to the *Miranda* Rules

Taken together, the combination of Section 3501 and the changes outlined above to prevent coerced confessions — along with the Fifth Amendment's exclusion of involuntary statements — renders *Miranda*'s automatic exclusionary rule unnecessary. Unlike the *Miranda* rule, which "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306-10 (1985), the civil and criminal sanctions adopted by Congress focus more directly on conduct that squarely implicates the Fifth Amendment proscription against compelled self-incrimination. At the same time, they provide stronger remedies against federal agents who coerce confessions than does the *Miranda* exclusionary rule. The exclusion of evidence of course "does not apply any direct sanction to the individual official whose illegal conduct" is at issue. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). In contrast, civil remedies directly affect the offending officer. Similarly, civil actions against the United States provide a tangible financial incentive to insure that federal practices comport with constitutional requirements. Training and internal disciplinary actions against federal agents must also be considered an important part of the calculus. Thus, "[b]y all appearances," Congress, the Executive (and the Court in *Bivens*) have "already taken sensible and reasonable steps to deter [Fifth] Amendment violations by" police officers, and "this makes the likely additional deterrent value of the [*Miranda*] exclusionary rule small." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1049 (1984).

---

enforcement agency, the Attorney General has the authority to seek systemic injunctive and declaratory relief under 42 U.S.C. 14141 (adopted in 1994). Moreover, the federal judiciary, through direct appeals and habeas proceedings, can review all state court voluntariness determinations. *See Miller v. Fenton*, 474 U.S. 104 (1985).

The parties do not challenge our contention that the combination of Section 3501 and the other measures we have identified provides as much prophylactic protection as the *Miranda* rules against actual Fifth Amendment violations. Their only response is contained in a footnote in the government's brief. Govt. Br. at 28 n. 20. The government maintains that, even assuming this combination is *more* effective than *Miranda* in preventing such violations, it still cannot be preferred. Relying on language from *Miranda*, the government contends that alternatives must be shown to be "at least as effective [as *Miranda*] in apprising the accused persons of their rights of silence and in assuring a continuous opportunity to exercise it." Govt. Br. at 27 (*quoting Miranda*, 384 U.S. at 467).

This language obviously was not necessary to the decision in *Miranda*. *Compare Harris*, 401 U.S. at 224 ("Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.") Moreover, these statements cannot be reconciled with the present understanding of *Miranda*.

Miranda's various statements about the need for equally effective alternatives cited by the parties all occur in those parts of the opinion where the Court seems to be saying that any statement obtained without a prior explanation to the defendant of his rights is necessarily compelled. But as we explain *supra* at pp. 8-9, *Quarles*, *Harris*, and *Hass* make it clear that those portions of *Miranda* are not good law, since in each case, suspects' statements were found voluntary and admissible despite having been obtained without either compliance with *Miranda* or any "equally effective" alternative to make sure the suspects were aware of their rights.

Once those portions of *Miranda* fall, the force of the "equally effective" langauge falls with it. The Court would only have the authority to insist on warnings or their equivalents if the admission of a statement obtained without these measures would violate the Constitution. Under the only interpretation

of *Miranda* that can be squared with *Quarles*, *Harris*, and *Hass*, that is not the case. The surviving justification for a "warnings or equivalent" requirement, and thus the one informing how that "requirement" should be interpreted today, is instead to help prevent future Fifth Amendment violations. In that case, however, other prophylactic measures that provide equivalent protection against the use of actually compelled statements are constitutionally sufficient even if they do not provide equivalent assurance that the suspect was informed of his rights. *Cf. Smith v. Robbins*, 120 S.Ct. at 759 (upholding against constitutional challenge an alternative to *Anders* procedure that provided protection for the constitutional right at issue at least as good as that contained in *Anders*). In other words, the *Miranda* Court's authority to order Congress to enact (if it was to enact anything) a regime mostly identical in terms of warnings to the one the Court devised has been undermined by the Court's own understanding, evident in its more recent cases, that the regime itself was never constitutionally mandated.[27]

A final reason for upholding the statute is the Court's traditional reluctance "to avoid imposing a single solution on [the Congress and] the States from the top down." *Smith v. Robbins*, 120 S.Ct. at 750. So far as custodial police questioning is concerned, the law has remained immobilized in *Miranda*'s 1960's gaze, as foreseen by *Miranda*'s dissenters. *See* 384 U.S. at 524 (Harlan, J., dissenting) ("[d]espite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap serious efforts at reform."). Today police do not

---

[27] Finally, we would note that even if *Miranda* could somehow insist that any substitute for its regime be "at least as effective" in assuring that suspects are advised of their rights, we believe Section 3501 would actually satisfy that standard, or at least that there is sufficient reason to believe that it would, that this Court should defer to Congress' judgment on that point. *Cf. Bush*; *Chilicky*. Since the judgment of the court of appeals over a year ago upholding Section 3501 in the Fourth Circuit, it does appear that in practice, Section 3501 has indeed been at least as effective as the *Miranda* regime.

generally use such potentially desirable reforms such as videotaping. No doubt such alternatives could be made more appealing to legislators and administrators if some trade-off were allowed in relaxing features of the *Miranda* system not required by the Constitution and detrimental to law enforcement. More than three decades of experience, however, shows that it is impossible as a practical matter to explore such alternatives under the *Miranda* regime. As the Court has warned in other contexts, "'[J]udicial imposition of a categorical remedy . . . [has] pretermit[ted] other responsible solutions being considered in Congress and state legislatures.'" *Smith v. Robbins*, 120 S.Ct. at 758 (*quoting Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (Kennedy, J., concurring in the judgment)).

III. IF CONGRESS CANNOT ALTER *MIRANDA*'S IRREBUTTABLE PRESUMPTION, THIS COURT SHOULD

If, contrary to our submission, the Court concludes that congressional modification of *Miranda* was impermissible, the Court should nevertheless affirm the Fourth Circuit's judgment by making its own modification to *Miranda*. Specifically, it should abandon the irrebuttable presumption that confessions obtained without compliance with the *Miranda* procedures are always involuntary, and instead make clear that that presumption may be rebutted. Such a modification would then permit the Court to uphold the constitutionality of Section 3501.

Modification of *Miranda* in this fashion would bring that case into harmony with the principles of the Court's landmark decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). There, the Court distinguished between permissible prophylactic measures adopted to remedy or prevent unconstitutional actions, and impermissible attempts to rewrite constitutional protections disguised as prophylactic or remedial measures. For a prophylactic measure to be upheld as truly remedial or preventive, there must be "congruence and proportionality between the injury to be

prevented or remedied and the means adopted to that end." *Id.* at 508; *see Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000). In its current form, *Miranda*'s prophylactic regime does not satisfy these requirements. If, however, the Court modifies that regime to allow rebuttal of the currently irrebuttable presumption of involuntariness covering all non-complying custodial confessions, the modified regime would be consonant with *Boerne*.

A. *Miranda*'s Irrebuttable Presumption Is Not Congruent and Proportional to the Problem of Involuntary Confessions

In *Boerne*, the Court held that there are significant limits even on Congress' power to devise remedial measures.[28] Otherwise, the power to enforce the right at issue would be transformed into the power to make "a substantive change in constitutional protections." *Id.* at 532. To insure against rewriting the Constitution in the guise of remediation, the Court has considered whether a response is "out of proportion to its supposed remedial . . . objectives." *Kimel*, 120 S.Ct. at 644.

Miranda's rules are out of proportion because they "prohibit[] substantially more" police practices than would "likely be held unconstitutional under the applicable" Fifth Amendment standard. *Id.* at 647. To be sure, confessions obtained without complying with *Miranda*'s procedures may sometimes be

---

[28] Because Congress has Section 5 "enforcement" power under the Fourteenth Amendment, as well as the power to craft "necessary and proper" legislation under U.S. CONST., art. I, § 8, its authority to craft prophylactic measures is presumably broader than the Court's. *Compare Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (upholding congressional ban on literacy tests) *with Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45, 51-54 (1959) (Court refuses to strike down literacy tests under its own authority to enforce the Equal Protection Clause). Because, as we show in this section, even *Congress* could not apply *Miranda*-style prophylactic legislation to the States under *Boerne*, this case does not present the important question of how much narrower the Court's power to craft prophylactic rules may be.

involuntary. But there is little reason to believe that this will be true all the time or even most of the time:

> In case after case, the courts are asked . . . to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. Whether the suspect was in "custody," whether or not there was "interrogation," whether warnings were given or were adequate, whether the defendant's equivocal statement constituted an invocation of rights, whether waiver was knowing and intelligent — this is the stuff that *Miranda* claims are made of. While these questions create litigable issues under *Miranda*, they generally do not indicate the existence of coercion . . . sufficient to establish involuntariness.

Withrow v. Williams, 507 U.S. at 709-10 (O'Connor, J., dissenting) (collecting numerous illustrations). In this very case, for example, the district court found *Dickerson*'s unwarned statements voluntary under the Fifth Amendment. J.A. 158 n.1.[29]

Miranda's lack of proportionality is shown not only by its overbroad reach in particular cases, but also by its unlimited application. *Miranda*'s automatic exclusionary rule applies to every episode of custodial questioning conducted by every level of government, federal, state, and local, numbering in the hundreds

[29] The voluntariness of the statements in this case is typical of *Miranda* violations that have reached this Court over the years. *See, e.g., United States v. Green*, 504 U.S. 908 (1992) (No. 91-1521) (statement specifically found to be voluntary below, *see* 592 A.2d 985, 986 n.2 (D.C. 1991)), *cert. dismissed*, 507 U.S. 545 (1993); *Oregon v. Elstad*, 470 U.S. 298, 315 (1985) ("It is beyond dispute that respondent's earlier [un-Mirandized] remark was voluntary"); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) ("There is no evidence or suggestion that Hass' statements to [police]. . . were involuntary or coerced."); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) ("the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination").

of thousands each year. It is not limited to a particular period of time or to jurisdictions with a particular history of abuse. It contains no mechanism for a jurisdiction to extricate itself by showing that it has had a long history of compliance with the Self-Incrimination Clause. *Cf. Boerne*, 521 U.S. at 533 (commenting favorably on the presence of such devices as a means of assuring proportionality). The "indiscriminate scope" of the rules is itself strong evidence that they are disproportionate. *Kimel*, 120 S.Ct. at 650.

Finally, *Miranda*'s irrebuttable presumption is disproportionate in another sense as well: it rigidly excludes confessions obtained without compliance with *Miranda* regardless of any other circumstances. This can lead to "disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule [that] is contrary to the idea of proportionality that is essential to the concept of justice." *Stone v. Powell*, 428 U.S. at 491.

The Court has also looked to the scope of the problem Congress is addressing when considering the breadth of prophylactic rules. The scope of the problem to which *Miranda* was responding remains unclear, but the evidence of epidemic police abuse was, and is, quite limited. *Miranda* did refer to "anecdotal evidence" concerning abusive police interrogation, *id.* at 645,[30] which no doubt was a problem in exceptional cases before *Miranda* — just as it remains a problem in some exceptional cases today. But the bulk of the justification in the opinion came

[30] Interestingly, *Miranda* did not cite any contemporary cases in which the police had extracted a confession through threatened force. For this point, it relied on such dated information as the Wickersham Report in 1931 and a few Supreme Court cases in the 1940s and early 1950s. 384 U.S. at 445-46. *Miranda* went on to conclude that police coercion "is not, unfortunately, relegated to the past or to any part of the country," *id.* at 446, resting this assertion on a few additional isolated and dated reports. *Id.* The Court conceded, however, that "the examples given above are undoubtedly the exception now." *Id.* at 447.

from an examination of "police manuals and texts" on techniques for questioning suspects. *Miranda*, 384 U.S. at 448. The difficulties with this material as evidence of pervasive coercion in custodial interrogations, however, are legion. *See generally id.* at 532-33 (White, J., dissenting). In fact, the *Miranda* majority acknowledged that it had little idea about typical practices. *Id.* at 448. Moreover, while the police manuals were offered as evidence of compulsion, the *Miranda* court in fact concluded only that they created the "potentiality for compulsion." *Id.* at 457. Thus the opinion in effect admitted its failure to demonstrate that the techniques and circumstances it characterized as giving rise to potential compulsion pervasively resulted in *actual* compulsion.[31] Nor is that particularly surprising, for it is clear that the *Miranda* Court's true concern was with the potentially coercive circumstances themselves, not with actual compulsion — just as it is clear that "[the 103d] Congress' concern was with the incidental burdens imposed" on religion by neutral laws, not with "deliberate persecution." *Boerne*, 521 U.S. at 531-32.

[31] It is also noteworthy that both the executive and legislative branches reached their own conclusions, contemporaneously with *Miranda*, that coercion as traditionally understood was not pervasive in custodial interrogations. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967) (stating, based on pre-*Miranda* data, that "today the third degree is almost nonexistent"); S. REP. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134 (1968) (reviewing congressional testimony from expert witnesses on lack of coercive techniques and concluding *Miranda*'s contrary findings were based on an "overreact[ion] to defense claims that police brutality is widespread"); *see generally* Cassell, Miranda's *Social Costs, supra*, 90 Nw. U.L. Rev at 473-78 (collecting evidence on limited number of involuntary confessions in 1966).

B. Changing *Miranda*'s Irrebuttable Presumption to a Rebuttable One Would Create a Remedial Measure Congruent and Proportionate to the Problem of Coercive Police Conduct

The lack of congruence and proportionality between *Miranda*'s rules and Fifth Amendment violations can be cured by changing *Miranda*'s irrebuttable presumption to a rebuttable one. Today, the "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" which is "irrebuttable for purposes of the prosecution's case in chief." *Oregon v. Elstad*, 470 U.S. at 307. In other contexts, such rigid presumptions are typically justified on the ground that they "avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991).[32] Here, however, the presumption operates to achieve incorrect results in many cases.

"Per se rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* Under *Kimel* and *Boerne*, the present irrebuttable presumption creates a jarring lack of "congruence and proportionality." Indeed, to apply an irrebuttable presumption is effectively to change the Fifth Amendment's compulsion standard to a new, warnings-and-waiver standard, thus "alter[ing] the

[32] Per se rules are also sometimes justified on the grounds that exceptions are not sufficiently "important to justify the time and expense necessary to identify them." *Coleman*, 501 U.S. at 737 (internal quotation omitted). This rationale has no application here. Congress has determined to the contrary that the judiciary should devote such additional energy as may be needed (if any) to making accurate (rather than presumptive) voluntariness determinations in federal criminal cases. Moreover, because confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran v. Burbine*, 475 U.S. 412, 426 (1986), individualized voluntariness determinations will be time well spent.

meaning" of the Fifth Amendment, *Boerne*, 521 U.S. at 519, and "substantively redefin[ing] the State's legal obligations" during custodial interrogation, *Kimel*, 120 S.Ct. at 648. *See generally* J. GRANO, *supra*, at 198 (*Miranda* "substituted for the constitutional rule a new substantive rule of its own making").

These problems would be substantially resolved if this Court modifies *Miranda* so that it operates as a rebuttable presumption — that is, confessions taken without following the *Miranda* procedures would be presumed involuntary unless the state can prove otherwise. Justice Clark suggested this approach in his dissent in *Miranda* as an intermediate position between the majority and the other dissenters. He proposed that "[i]n in the absence of warnings, the burden would be on the State to prove . . . that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary." 384 U.S. at 503 (Clark, J., dissenting).

This allocation of burdens, superimposed on Section 3501 (which can easily be read in this fashion[33]), brings Section 3501's prophylactic effect even closer to that of *Miranda*'s exclusionary rule by explicitly conferring a preferred status to confessions obtained in compliance with *Miranda*. At the same time, it eliminates the single feature of *Miranda*'s irrebuttable presumption most objectionable under *Boerne*: the imposition of a standard for the admissibility of custodial confessions more stringent than the constitutional voluntariness standard, and the attendant automatic exclusion of many statements that in fact comply with the constitutional standard. In contrast, a rebuttable presumption would be a proportionate response to the various risks identified by the *Miranda* Court. It would also preserve the assistance to the courts that the *Miranda* factors have provided in structuring to the voluntariness inquiry, while bringing to an end the irrationally mechanical application of those factors to exclude

[33] Section 3501(a) provides that a confession "shall be admissible in evidence *if* it is voluntarily given" (emphasis added), implying that the presumption is against admissibility unless and until voluntariness is established.

unwarned confessions, no matter what the circumstances, even when the confession is unquestionably voluntary.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court performed a similar modification to a test it had previously suggested but came to regard as overly rigid. In *Gates*, the Court rejected the two-pronged "*Spinelli-Aguilar*" test for determining probable cause in favor of a totality-of-the-circumstances approach. Raising a concern that applies equally to the *Miranda* doctrine, the Court explained that "the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts . . . ." *Id.* at 234-35. Yet, in restoring the totality-of-the-circumstances approach, the Court emphasized that the *Spinelli-Aguilar* factors remained "highly relevant" in determining probable cause, *id.* at 230, and later cases have examined them, *see Alabama v. White*, 496 U.S. 325, 328 (1990). Thus, just as the *Spinelli-Aguilar* factors now serve "not as inflexible, independent requirements applicable in every case," but rather as "guides to a magistrate's determination of probable case," *Gates*, 462 U.S. at 230, so too the *Miranda* factors would guide determination of voluntariness issues.

Changing the *Miranda* presumption to a rebuttable one would not merely return the law to its pre-*Miranda* state. When *Miranda* was decided, the constitutional assignment of the burden for establishing voluntariness was unclear. *See Developments in the Law — Confessions*, 79 HARV. L. REV. 938, 1069-70 (1966) (noting majority rule that state proves voluntariness and minority rule that defendant proves involuntariness).[34] A rebuttable *Miranda*

[34] The issue has been clarified, but not been definitively resolved, after *Miranda*. *Lego v. Twomey*, 404 U.S. 477, 489 (1972), definitely suggests that the prosecution must prove voluntariness. *See generally* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 10.3(c) at 429 (2d ed. 1999) (noting *Lego* "raises serious doubts" about placing burden on defendant to prove involuntariness). But some states continue to place the burden on the defendant to show involuntariness. *See, e.g., Chambers v. States*, 742 So.2d 466, 476 (Fla. Dist. Ct. App. 1999).

presumption could be crafted that would place the burden on the government to establish voluntariness while making delivery of *Miranda* warnings an important part of the calculus.

The parties spend little time justifying the inflexibility of the *Miranda* rules, relying instead almost exclusively on a general argument against overruling *Miranda*. But the irrebuttable presumption that underlies the automatic exclusionary rule has been effectively repudiated by cases such as *Quarles* and numerous others we have discussed. Even without that doctrinal development, however, there would be ample grounds for changing the inflexible presumption. "*Stare decisis* is not an inexorable command" and "[t]his is particularly true in a constitutional case." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). "The justifications for the case system and stare decisis must rest upon the Court's capacity, and responsibility, to acknowledge its missteps." *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 914 (2000) (Kennedy, J., dissenting). Most importantly, "when governing decisions are . . . badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827 (internal quotation omitted).

This criticism applies with special force to the *Miranda* decision. That 5-to-4 decision was flatly in conflict with 180 years of common law and constitutional history, and with substantially all prior judicial precedent, which required the suppression of pretrial statements only in cases involving actual compulsion by the government, and explicitly rejected the complex of procedural rules that *Miranda* imposed. *See DOJ Report*, *supra*, 22 U. MICH. J. L. REF. at 453-84, 491-506. Against that backdrop, stare decisis provides no basis for preserving the anachronistic, yet sweeping and irrebuttable, presumption that anchors *Miranda*'s exclusionary rule.

* * * * *

The parties close their briefs with an appeal to "transcend[ent]" factors allegedly arguing against Section 3501,

namely what is said to be the "important role" *Miranda* has come to play in maintaining confidence in the nation's criminal justice system. Govt. Br. at 49; *see* Pet. Br. at 44. We agree that important factors are at stake here, but they argue for upholding the statute.

Foremost among these factors is the importance of the search for truth. "The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (internal quotation omitted). Public confidence in the criminal justice system cannot possibly be enhanced by a rule that conceals from the jury truthful and voluntarily given confessions. Public confidence cannot be enhanced by the result of that concealment, namely, a significantly increased risk that an admitted criminal will go free. Public confidence cannot be enhanced by a rule that turns its back on discovering the facts in favor of an irrebuttable presumption that is always slanted and often wrong. And lastly, with all due respect to *Miranda*, public confidence cannot be enhanced by a ruling of this Court bottomed on the 1960's view that law enforcement officers are so much to be distrusted that the law of confessions will start by presuming their penchant for lawless, strong-arm tactics.

Public confidence is, instead, best served by permitting citizens to give voice to their views through their elected representatives. By substantial bi-partisan majorities, those representatives adopted Section 3501 precisely for the purpose of changing *Miranda*'s automatic exclusionary rule while preserving a strong incentive to continue advising suspects of their rights. This judgment was in our view balanced and wise, but for however that may be, it fully honored the requirements of the Fifth Amendment and thus merits this Court's approval.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

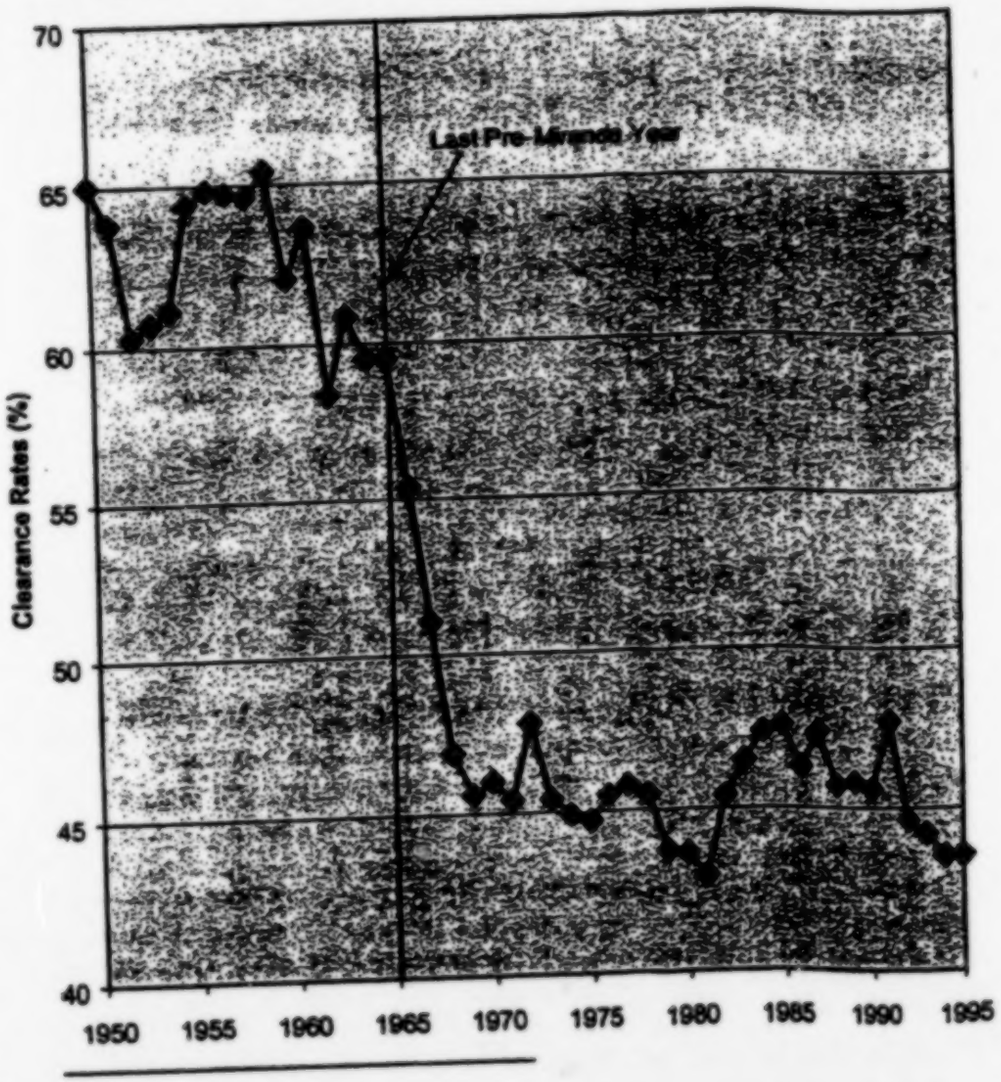
Paul G. Cassell
(*Court-Appointed Amicus*)
University of Utah
College of Law
332 S. 1400 E. Front
Salt Lake City, UT 84112
(801) 585-5202

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: March 9, 2000

Appendix A

Figure 1 - Violent Crime Clearance Rates from 1950 to 1995



This chart, which depicts the Violent Crime Clearance Rates from 1950 to 1995, is reproduced in Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1069 (1998), and is based on information gathered from the *Federal Bureau of Investigation, Uniform Crime Reports* published over the various years.

APPENDIX B

1. The Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."

2. Section 3501 of Title 18 provides as follows:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the abovementioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other official empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other official beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Mar 9 2000

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
The United States Court of Appeals
For the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, & FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, IN SUPPORT OF AFFIRMING THE DECISION OF THE U. S. COURT OF APPEALS

Robert J. Cynkar*
Margaret A. Ryan
Cooper, Carvin & Rosenthal
1500 K Street, N.W., Suite 200
Washington, DC 20005
(202) 220-9600
*Counsel of Record for *Amici Curiae*

Stephen R. McSpadden
General Counsel
National Association of
Police Organizations
750 First Street, N.E.
Suite 920
Washington, DC 20002

Additional counsel listed inside cover.

BEST AVAILABLE COPY

39pp

Edward J. Smith
General Counsel
International Brotherhood
of Police Officers
317 South Patrick Street
Alexandria, VA 22305

Lawrence Berger
Mahon & Berger
350 Old Country Rd., Suite 101
Garden City, NY 11530
(General Counsel, Federal Law
Enforcement Officers
Association)

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICI CURIAE*..... 1

STATEMENT OF THE CASE..... 2

INTRODUCTION AND SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 6

I. SECTION 3501 BETTER SERVES CORE FIFTH AMENDMENT VALUES THAN THE RIGID APPLICATION OF THE *MIRANDA* FORMULA..... 7

II. THE *MIRANDA* FORMULA DOES NOT PROMOTE THE TRUTHFINDING FUNCTION OF EFFECTIVE LAW ENFORCEMENT..... 16

A. The *Miranda* Formula Is The Classic "Technicality" That Undermines Public Confidence In Criminal Justice By Excluding Voluntary, Reliable Confessions... 16

B. The Supposed "Bright Line" Of The *Miranda* Formula Is Illusory, Creating Only A Chimera That Masks The Broad Range Of Issues That Still Remain In Any Application Of *Miranda*..... 19

C. Modern Interrogation Techniques Further The Interest Of Society, While Protecting The Constitutional Rights Of Suspects 22

III. UNLIKE OTHER "PROPHYLACTIC" HOLDINGS OF THE COURT, THE *MIRANDA* FORMULA HAS NEVER BEEN HELD TO BE REQUIRED BY THE CONSTITUTION 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Anders v. California, 386 U.S. 738 (1967) 26, 27

Blackburn v. Alabama, 361 U.S. 199 (1960) 11, 13

Blackledge v. Perry, 417 U.S. 21 (1974) 28

Brown v. Mississippi, 297 U.S. 278 (1936) 9, 13

Bruton v. United States, 391 U.S. 123 (1968) 29

Colorado v. Connelly, 479 U.S. 157 (1986) 12

Colorado v. Spring, 479 U.S. 564 (1987) 23

Davis v. United States, 512 U.S. 452 (1994) 8

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 9

Duckworth v. Eagan, 492 U.S. 195 (1989) ..... *passim*

Gertz v. Welch, 418 U.S. 323 (1984) 29

Hopt v. Utah, 110 U.S. 574 (1884) 9

Illinois v. Perkins, 496 U.S. 292 (1990) 23

Lisenba v. California, 314 U.S. 219 (1941) 8, 13

McNeil v. Wisconsin, 501 U.S. 171 (1991) 17

Michigan v. Tucker, 417 U.S. 433 (1974) 7, 9

Minnick v. Mississippi, 498 U.S. 146 (1990) 14, 15

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 8, 23

New York v. Quarles, 467 U.S. 649 (1984) 12

North Carolina v. Pearce, 395 U.S. 711 (1969) 27, 28

N.Y. Times v. Sullivan, 376 U.S. 254 (1964) 29

Oregon v. Elstad, 470 U.S. 298 (1985) 10, 12, 23

Rhode Island v. Innis, 446 U.S. 291 (1980) 15

Rice v. Cooper, 148 F.3d 747 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2052 (1999) 23

Smith v. Robbins, 120 S. Ct. 746 (2000) 26

Thasaphone v. Weber, 137 F.3d 1041 (8th Cir.), *cert. denied*, 523 U.S. 1130 (1998) 21

United States v. Carignan, 342 U.S. 36 (1951) 9

United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) 29

United States v. Erving L., 147 F.3d 1240 (10th Cir. 1998) 21

United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) 21

United States v. Salvo, 133 F.3d 943 (6th Cir.), *cert. denied*, 523 U.S. 122 (1998) 21

United States v. Washington, 431 U.S. 181 (1977) 12

Withrow v. Williams, 507 U.S. 680 (1993) ..... *passim*

Constitution, Statutes and Rules

U.S. CONST. amend. V 4

18 U.S.C. § 3501 ..... *passim*

18 U.S.C. § 3501(b) 3, 4, 11

Supreme Court Rule 37.6 1

Supreme Court Rule 37.3(a) 1

Other

HADLEY ARKES, BEYOND THE CONSTITUTION 184 (1990) 8, 14, 15

Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions – And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998) 11

Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175 (1999) 10, 19

Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996) 17

Linda Chavez, *Hesitation Waltz at Justice*, WASH. TIMES, Oct. 7, 1999 18

Ann Coulter, *Challenging Miranda*, CHATTANOOGA TIMES, Oct. 8, 1999 18

Ann Coulter, *We Can Do Nicely Without Miranda*, CHATTANOOGA TIMES, Jan. 7, 2000 19

J.F. Ghent, What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring that Suspect be Informed of His Federal Constitutional Rights Before Custodial Interrogation, 31 A.L.R.3d 565 (2000) 20

JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1996) 10

FRED E. INBAU & JOHN E.. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) 24

FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986) 24, 25

BRIAN C. JAYNE & JOSEPH P. BUCKLEY,

THE INVESTIGATOR ANTHOLOGY 459 (1999) 25

Saul M. Kassin & Katherine L. Kiechel, *Police Interrogations and Confessions: Communicating Promises by Pragmatic Implication*, 15 PSYCHOL. SCI. 233 (1991) 25

Saul M. Kassin & Katherine L. Kieche, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 25

Leonard W. Levy, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 268 (1972) 14

OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRETRIAL INTERROGATION 3 (1986) 7, 19

Opinion, *Miranda Wrongs; Supreme Court to Revisit Landmark 1966 Ruling*, SAN DIEGO TRIB., Dec. 8, 1999 18

President's Panel on Mental Retardation, REPORT OF THE TASK FORCE ON LAW 33 (1963) 11

Morgan Reynolds, *It's Time to Overturn Miranda*, CHICACO TRIB., Dec. 5, 1999 18

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO"), submits this brief in support of affirming the decision of the U.S. Court of Appeals for the Fourth Circuit, and is joined in this brief by *amici curiae* the International Brotherhood of Police Officers and the Federal Law Enforcement Officers Association.[1]

NAPO is a national non-profit organization, representing state and local law enforcement officers throughout the United States. Specifically, NAPO is a coalition of associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations, with over 230,000 sworn law enforcement officers and 11,000 retired officers.

The International Brotherhood of Police Officers (IBPO) is an affiliate of the Services Employees International Union. The IBPO represents over 50,000 police officers throughout the Nation and is the largest police union in the AFL-CIO.

The Federal Law Enforcement Officers Association (FLEOA), with more than 8,000 members, is the largest professional association in the nation exclusively representing federal law enforcement officers and criminal investigators from 38 agencies.

Amici have a significant interest in the important issue before this Court. We offer the perspective of *amici*'s organizations and their members, the men and women "on the street" who have dedicated their professional lives to the enforcement of our laws. From that perspective, we believe that this case offers the Court

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Both Respondent and Petitioner have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

the opportunity to speak clearly about the principles of justice memorialized in the Fifth Amendment that are at stake in this case, which includes identifying and punishing those who commit crimes, without coerced self-incrimination. Interrogation of criminal suspects is a recognized and integral component of law enforcement, necessary in many cases to arrive at truthful information concerning the facts and circumstances of criminal activity. Confessions and statements from criminal suspects are inherently reliable and beneficial to society as a whole, as long as they are obtained through constitutional and non-coercive means. Thus, the constitutional principles governing interrogations that are at issue in this case play a central role in the day-to-day professional lives of *amici*'s 288,000 member officers.

STATEMENT OF THE CASE

The events that bring this case to the Court were set in motion by a 1997 armed bank robbery in Alexandria, Virginia, and the incriminating statements made by Petitioner Charles Dickerson to FBI Special Agents during a subsequent interview at the FBI's Washington, D.C. Field Office.

The FBI had been led to Petitioner by the fact that the getaway car, observed by a witness at the scene, was registered to him. After a short, initial conversation at Petitioner's apartment, he agreed to voluntarily accompany the FBI Special Agents to their Field Office. At the outset, Petitioner admitted to being at the scene in his car, but denied any involvement in the crime. Petitioner refused to consent to the agents' search of his apartment. Although the district court subsequently found that Petitioner was in custody, at the time he was not under arrest. The fact that he was not under arrest was one exigent circumstance that spurred the agents to obtain an immediate search warrant by telephone for Petitioner's apartment.[2]

[2] The search of Petitioner's apartment turned up a handgun, dye-stained money, a bait bill from an earlier robbery, and other evidence, which implicated Petitioner "in multiple bank robberies and an armed car-jacking during which a gun was taken that later was used to murder an off-duty correctional officer." J.A. 86

At some point after the agents told Petitioner that they were going to search his apartment, he made a statement in which he denied his involvement in the bank robbery but identified James Rochester as the person who had accompanied him to Alexandria. Petitioner described various suspicious actions of Rochester after they left the scene. This included asking Petitioner to stop so Rochester could put something into the trunk, asking Petitioner to run a red light and giving Petitioner a silver handgun and some dye-stained money. Petitioner advised the agents that he suspected Rochester of having committed a robbery, especially since Petitioner knew that Rochester came to D.C. after committing several robberies in Georgia. (Rochester later admitted to robbing several banks in the D.C. area, and stated that Petitioner was his getaway driver in each of these robberies.)

The Petitioner moved to suppress his statements. The key issue before the district court was a dispute over whether Petitioner was given his *Miranda* warnings before or after these statements. Petitioner did not try to establish that his statements were in some way coerced by the FBI agents or to claim in any other way that they were actually involuntary. The district court concluded that Petitioner had been in custody during the interview and that he had not been advised of and waived his *Miranda* rights until after he had made the statements at issue, notwithstanding a hand-written note from Petitioner, indicating he was read his rights before he made any incriminating statements. Consequently, Petitioner's statements were suppressed.

The Fourth Circuit reversed the exclusion of the incriminating statement (and other evidence) on the grounds that 18 U.S.C. § 3501, rather than *Miranda*, governs the admissibility of confessions, and that the district court had found that Petitioner's confession was completely voluntary. The Fourth Circuit expressly found that the *Miranda* formula was not constitutionally

compelled.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the power of Congress to make a judgment different from that of this Court regarding the practical mechanism best suited to preserve the principles of justice articulated in the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This Court, in its 5-to-4 decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), held that all statements obtained from a criminal defendant in custody, without law enforcement officers first having advised that defendant of certain rights, are presumed to be the result of coercion in violation of the Fifth Amendment and cannot be admitted in the prosecution of that defendant. Just two years later, accepting the *Miranda* Court's explicit invitation to develop its own safeguards for the rights at issue, Congress enacted 18 U.S.C. § 3501. In doing so, Congress did not reject the *Miranda* formula, but concluded that the reciting of that formula should be one of several factors in an inquiry that focused on the key constitutional issue, that is, whether a statement from a defendant was voluntarily given. In sum, section 3501 provides that the "presence or absence" of the *Miranda* warnings and the defendant's knowledge of the nature of the offense for which he was charged or suspected at the time of his confession, while taken into consideration by the judge, "need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. § 3501(b).

However well intentioned, the teaching of *Miranda* can now be seen as flawed in critical respects. *Miranda* created a logic that is unfaithful to the Constitution and the particular rights at issue here. In addition, the logic of *Miranda* wrongly juxtaposes the interests of law enforcement with the rights of defendants and ultimately is at war with the fundamental proposition from which all rights and duties arise: unless immature or otherwise incompetent, all human beings have the unique capacity to know right from wrong and can be held accountable when they are guilty of a criminal act. Indeed, it is the basic and solemn commission of all

who participate in the rendering of justice, whether in law enforcement, in the judiciary, or in the penal system, to faithfully determine, according to their particular roles, who committed a crime and whether punishment is justified or unjustified. These tasks have meaning only because of the capacity, indeed the dignity, of human beings as moral agents. Consequently, the *Miranda* formula is at odds with the values of the Fifth Amendment, offers only the illusion of a "bright line" to preserve those values, brings the criminal justice system into disrepute, and sets up an artificial tradeoff between the constitutional right against compelled self-incrimination and the interests of society in fair and effective law enforcement.

Under the mischievous influence of the flawed logic of *Miranda,* we see here Petitioner and his *amici* offering broad claims that the rigid application of the *Miranda* formula actually serves the principles of the Fifth Amendment, advances the interests of effective law enforcement, and encourages public confidence in the criminal justice system. Each of these claims is not only wrong but at odds with the elementary notions of justice.

We are justified in punishing someone only because we have carefully – even scrupulously – determined that that person committed a crime. Justice requires that the guilty be identified, tried, and punished, and that the innocent go free. In essence, the judgment of any tribunal that a defendant is guilty must be *true.* It is that core truth in imposing a criminal sanction – that such a sanction is truly justified – which gives the public confidence in the criminal justice system. The purpose of police questioning of a suspect or witness is to arrive at the truth. A coerced confession is a double-barreled vice: it produces "evidence" that is inherently unreliable, at odds with the mission of the police to find the truth, and it is an affront to the dignity of an individual as a moral agent.

Under the rigid application of the *Miranda* formula urged as a constitutional litmus test by Petitioner and his *amici,* the absence of any coercion by the police during a custodial interrogation, and the complete voluntariness of an incriminating statement that results, are of no significance whatsoever. Under this regime, the

Miranda formula becomes the quintessential "technicality," a vehicle inviting unnecessary efforts to exclude reliable and uncoerced statements. As a result, the process of criminal justice is reduced to a game, where the incantation of magic words offers no advantage to the innocent, but serves instead to give the guilty a "sporting chance" of acquittal.

Effective law enforcement is not aided by an inflexible reliance on the *Miranda* formula, for the variety of people and circumstances governed by our criminal laws is simply not susceptible to the mechanical application of a "bright-line" rule in this area. Even the *Miranda* "bright line" is only triggered when a suspect is in "custody," which, among other issues, remains a fertile subject for the energies of the adversaries in a criminal proceeding. Rather, judgment, in the first instance by professional law enforcement officers schooled in the constitutional principles they are sworn to uphold, and ultimately by the courts, will always be necessary when the focus is properly on the objective of the Fifth Amendment.

While the *Miranda* formula may still be used under the framework set out by Congress in section 3501, that structure realistically broadens the judicial inquiry to consider all of the circumstances surrounding an incriminating statement. It thus ensures that involuntary statements are excluded from the determination of a defendant's guilt, while voluntary statements will be admitted – even if an officer is mistaken about the suspect being in custody, gives imperfect *Miranda* warnings, gives them at the wrong time, or gives no warnings. The result achieved by an inquiry under section 3501, although different from the "prophylactic" procedure established by the *Miranda* Court, is faithfully grounded on constitutional principles, better serves the cause of justice, and can only raise the esteem in which the public holds the criminal justice system and the professionals sworn to uphold it.

ARGUMENT

The Solicitor General and several *amici* supporting Petitioner, purporting to represent the interests of those who are, or have been, involved in law enforcement, urge the Court to hold

section 3501 to be unconstitutional, because, in their view, the statute falls short of the requirements of the Fifth Amendment's Self-Incrimination Clause. They claim first, that the *Miranda* formula not only is faithful to the core values of the Fifth Amendment, but is actually "beneficial to law enforcement," Brief for the United States ("U.S. Br.") at 9, second, that it provides law enforcement with "a simple and consistent protocol," Brief of Griffin B. Bell, *et al.* as *Amici curiae* in Support of Petitioner ("Bell *Amici* Br.") at 2, and third, that, having "withstood the test of time, *id.* at 3, "it promotes public confidence that the criminal justice system is fair." U.S. Br. at 49.

Representing hundreds of thousands of local, state, and federal law enforcement officers whose daily professional lives are filled with making arrests, interrogating suspects, and testifying in criminal prosecutions, *amici* NAPO, IBPO, and FLEOA strongly disagree. Congress crafted section 3501 with an obvious appreciation of the variety of circumstances in which interrogations occur. This statute puts in place a framework for interrogations that recognizes that a confession may be voluntary even if the *Miranda* warnings are not given, and that the rigid application of the *Miranda* formula, far from benefiting law enforcement, creates a wholly unnecessary yet "profound cost to the truth-finding function of a criminal trial." U.S. Br. at 9.

I. SECTION 3501 BETTER SERVES CORE FIFTH AMENDMENT VALUES THAN THE RIGID APPLICATION OF THE *MIRANDA* FORMULA.

The right against compulsory self-incrimination has been protected in our legal system by the law of evidence, by the Self-Incrimination Clause of the Fifth Amendment, and by the Due Process Clause of the Fourteenth Amendment. *See Michigan v. Tucker*, 417 U.S. 433, 439-42 (1974); Joint Appendix ("J.A.") 192-95; OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRETRIAL INTERROGATION 3-22 (1986) ("OLP Report"). Before *Miranda* was decided, the central inquiry in determining whether a self-incriminating statement could be used against a defendant was whether the statement had been

made voluntarily. *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring). ("[V]oluntariness *vel non* was the touchstone of admissibility of confessions" up to *Miranda*.).

Even though *Miranda* established a new regime for protecting Fifth Amendment rights, the principle of voluntariness was essential to the Court's conclusion that custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Thus, the *Miranda* formula fully recognized the key role voluntariness plays in the operation of the Fifth Amendment, and was designed to ensure that incriminating statements were voluntarily made.

As we will discuss below, experience has now shown that the *Miranda* formula, unfortunately, is not the reliable bulwark for voluntary confessions the *Miranda* Court may have thought. Even worse, as the operation and logic of the *Miranda* formula has unfolded over the years, that formula can be seen as at war with the core Fifth Amendment values served by the voluntariness standard. Two such core values, rooted in the beliefs of the Framers, have figured prominently in the Court's thinking: that confessions compelled by the government "may lead to the conviction of innocent persons," and that such coercion "is often an adjunct to tyranny." *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

A. Undeniably, admissions of guilt "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). When the Court speaks of the enterprise of criminal justice in this way, it is speaking of "settling the cases in which punishment is *justified* or *unjustified* . . . . [I]t is . . . speak[ing] of establishing whether someone is guilty of a wrong, and therefore deserves punishment." HADLEY ARKES, BEYOND THE CONSTITUTION 184 (1990). As a result, the "logic of rendering justice begins by commanding our respect for the moral differences that

separate . . . the innocent from the guilty." *Id. See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (explaining that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence"). Accordingly, one core Fifth Amendment value is the avoidance of coercion to ensure the veracity of a confession, and so to advance the primary goals of a criminal trial: finding and punishing the true wrongdoer and exonerating the innocent.

The common sense of this proposition has long been reflected in the Court's jurisprudence. As long ago as *Hopt v. Utah*, 110 U.S. 574 (1884), this Court pointed out:

> Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.

Id. at 584-85. *See also United States v. Carignan*, 342 U.S. 36, 41 (1951) (noting that one basis for excluding involuntary confessions is "that forced confessions are untrustworthy"); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("[T]he trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence.").

The importance of this right against compulsory self-incrimination to reaching true verdicts in the criminal process has not diminished since *Miranda* was decided. The Court has underscored that *Miranda* was not intended to "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow v. Williams*, 507 U.S. 680, 692 (1993). *See also Tucker*, 417 U.S. at 448 (noting that one justification for the Fifth Amendment's exclusionary rule is "protection of the courts from reliance on untrustworthy evidence"); *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring).

Thus, one core dynamic of the Fifth Amendment is the linkage between *voluntary* self-incrimination and "the correct ascertainment of guilt," that is, the truth. Unfortunately, experience over the last 30 plus years shows that the *Miranda* formula has the effect of severing that link, in the end establishing neither the voluntariness of a confession nor the truth. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW *vi* (1996) ("*Miranda's* philosophical premises are pernicious precisely because they are indifferent, perhaps even hostile, to the goal of ascertaining the truth.").

The reason for this impact of the *Miranda* formula is apparent: the rigid insistence on the incantation of that formula as the prime determinant of the admissibility of an incriminating statement. As the Court has candidly observed:

> [U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

Oregon v. Elstad, 470 U.S. 298, 307 (1985). Indeed, in *Miranda* itself, no reasonable review of the facts supports the notion that Ernest Miranda was compelled to confess by Phoenix police officers. *See* Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 181-91 (1999) ("*The Statute That Time Forgot*").

Here, too, the record does not present a picture of a defendant who was coerced by police officers to confess, *see* J.A. 167-71, and neither the Petitioner nor any *amici* claims that Charles Dickerson's incriminating statements were involuntary. Clearly, the exclusion of voluntary statements, not in any way compelled by police officers, is drastically at odds with the value of truth-finding and serves no value conceivably embraced by the Fifth Amendment. Indeed, an observation of Justice O'Connor, made in a slightly different context but pertinent here, comes to mind:

> Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns.

Duckworth, 492 U.S. at 212 (O'Connor, J., concurring).

Moreover, the dynamic of the *Miranda* formula, with its focus on procedural technicalities, has "led the courts away from any close scrutiny of voluntariness – and hence, trustworthiness – in individual cases." Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions – And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 544 (1998). The superficiality of the *Miranda* formula provides limited protection for the rights of the most vulnerable, innocent suspects. *See id.* at 538-56. For example, "mental retardation may not be apparent at the time of interrogation," President's Panel on Mental Retardation, Report of the Task Force on Law 33 (1963), and such a suspect may hear the *Miranda* formula and proceed to make an apparently knowing, voluntary "confession," all the while being in fact so incompetent as to render that confession fundamentally untrustworthy.[3]

In contrast, section 3501 recognizes that *Miranda*-like warnings may be helpful in assuring the voluntariness of self-incriminating statements but properly makes that element only one of several considerations that a trial judge must take into account in evaluating the voluntariness of a confession. 18 U.S.C. § 3501 (b). As discussed below, the more flexible framework of section 3501 responds more effectively to the real-world exigencies of law enforcement. In short, section 3501 in no way diminishes the Fifth Amendment's guarantee against compelled self-

---

[3] *See, e.g., Blackburn v. Alabama*, 361 U.S. 199 (1960) (excluding as involuntary, under the pre-*Miranda* totality-of-the-circumstances approach, the confession of a mentally incompetent person who neither remembered the crime nor his confession, but who appeared normal).

incrimination, while it avoids the practical hostility of the *Miranda* formula to the truth.

The Petitioner's criticism of section 3501 illustrates how far removed the logic of *Miranda* is from the values of the Fifth Amendment. "If the government is allowed to keep its suspect in a state of ignorance," which Petitioner claims is the effect of section 3501, "the Fifth Amendment protections are reduced to a mere ' "form of words." ' " Brief of Petitioner ("Pet. Br.") at 3. But, it is Petitioner's rigid insistence on the *Miranda* formula as the essential criterion of voluntariness that reduces Fifth Amendment values to a "mere form of words," irrelevant to whether a self-incriminating statement was given without government coercion.

Moreover, the "Fifth Amendment itself does not prohibit all incriminating admissions; '[absent] some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.' " *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). The Self-Incrimination Clause protects a suspect from government coercion alone. The Fifth Amendment simply is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." *Elstad*, 470 U.S. at 304-305. *See also Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (rejecting the proposition that "a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness' ").

Thus, the failure to recite the *Miranda* formula is not equivalent to the *government* "keeping the suspect in a state of ignorance." To be sure, ignorance alone implicates no principle safeguarded by the Fifth Amendment or by any other constitutional norm. Beyond the clear teaching of this Court to this effect, no principle of reason or justice supports Petitioner's claim. What could an innocent suspect be ignorant of? In the absence of police coercion, does Petitioner seriously contend that the innocent suspect will be "ignorant" of the notion that he should not confess to

a crime that he did not commit? If he is, we suggest that such a hypothetical suspect would have to be mentally incompetent; as we pointed out above, only the fuller evaluation of section 3501's approach, and not the simple stating of the *Miranda* formula, is likely to protect such an unusually vulnerable person.

Again, in the absence of police coercion, any "ignorance" which leads the guilty subject to confess does not violate either the letter or the spirit of the Fifth Amendment. To exclude such a confession would not protect the suspect from the consequences of a coerced confession, for there was none, but would deprive the court of highly trustworthy evidence. In short, under Petitioner's view, we pay the profound cost of depriving the factfinder of the truth, while in no way protecting the Fifth Amendment right against compelled self-incrimination. This is the inevitable and pernicious result of the *Miranda* formula.

B. Although the core commitment of the Fifth Amendment to true verdicts is fundamental, it is not the exclusive value animating the Constitution's antagonism to coerced confessions. The Court's opinions have circled a "transcendent" value underlying the Fifth Amendment,[4] reflecting "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' " *Withrow*, 507 U.S. at 692 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964)).

This value of the Fifth Amendment really centers on the

---

[4] In this regard, the Court has pointed to "considerations which transcend the question of guilt or innocence." *Blackburn*, 361 U.S. at 206. Sometimes the Court refers to "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), or to "the important human values [that] are sacrificed" when government coerces a confession. *Blackburn*, 361 U.S. at 206. This other core value has been described as hostility to "tyranny," *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring), or to the "fundamental unfairness" of coerced confessions, "whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Framers' understanding of the dignity of each human person:

> [T]he right against self-incrimination did evolve as an essential part of due process and as a fundamental principle of liberty and justice. Thus Ben Franklin in 1735 called it a natural right ("the common Right of Mankind"), and Baron Geoffrey Gilbert, the foremost English authority on evidence at the time, called it part of the "Law of Nature."

LEONARD W. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 268 (1972).

Not only the right against self-incrimination, but our whole system of laws rests on our unique dignity as human beings, that is, our nature as moral agents. The moral logic of the law arises from that nature and from the recognition that each competent adult can know what is right and what is wrong, and do what is right and refrain from doing what is wrong. *See generally* Arkes, *supra*, at 199 ("The dignity of a moral agent arose from his capacity to give reasons over matters of right and wrong .... A moral agent would understand that he was obliged to do what was right and refrain from what was wrong."). Therefore the law is justified in punishing people who commit wrongs and is not justified in punishing the innocent.

The Fifth Amendment recognizes and preserves our dignity as moral agents by insisting on drawing the moral differences between the innocent and the guilty "in the most solemn and reasoned manner," *id.* at 184, a manner that recoils from the injustice of coerced confessions. Yet, an unavoidable corollary of this rejection of compelled self-incrimination is that a truly voluntary confession – naming and taking responsibility for a wrong committed – is profoundly consistent with and indeed *affirms* our dignity as moral agents.

With this understanding, a voluntary confession is to be encouraged, which the criminal law (apart from the *Miranda* formula) does. For example, a "confession is rightly regarded by the

Sentencing Guidelines as warranting reduction of sentence, because it 'demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct.' " *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting). *See also Miranda*, 384 U.S. at 538 (White, J., dissenting) ("[T]he process of confessing . . . may provide psychological relief and enhance the prospects for rehabilitation.").

The logic of the *Miranda* formula, however, inexorably works to corrode the moral dignity that is the ground of our Fifth Amendment rights. Witness, for example, the equating of an "appeal to a suspect to confess for the sake of others, to 'display some evidence of decency and honor,' " with the application of illicit "pressure" to unconstitutionally manipulate a suspect into a confession. *Rhode Island v. Innis*, 446 U.S. 291, 305-307 (1980) (Marshall, J., dissenting). The logic of *Miranda* and its progeny thus rests on a premise that "a rational man would never respond *rationally* to appeals for repentance or contrition." ARKES, *supra*, at 202. At best, such a notion is nonsense, essentially claiming that it is not reasonable for a suspect to act according to his nature as a being who can reason, that is, as a moral agent who can understand right and wrong. At worst, this premise is profoundly hostile to any claim that we are by nature moral agents and so entitled to any rights at all.

To be sure, we agree with the Court's observation in *Minnick*:

> Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause.

498 U.S. at 155. Congress, in the framework of section 3501, established those assurances. As we will now explain, the rigid regime of *Miranda* does not achieve that end and, in fact, detracts

from it.

II. THE *MIRANDA* FORMULA DOES NOT PROMOTE THE TRUTHFINDING FUNCTION OF EFFECTIVE LAW ENFORCEMENT.

As organizations with hundreds of thousands of experienced local, state, and federal law enforcement professionals, *amici* are in a position to offer the Court meaningful practical insights into the deleterious effects of *Miranda* on the truth-seeking function of law enforcement and on the role of interrogation in that enterprise. Contrary to the suggestions of those in favor of reversing the judgment below, *Miranda* does not benefit law enforcement, and is not necessary to conduct interrogations within constitutional bounds.

A. The *Miranda* Formula Is The Classic "Technicality" That Undermines Public Confidence In Criminal Justice By Excluding Voluntary, Reliable Confessions.

As the Solicitor General admits, *Miranda* imposes costs on the truth-seeking function of a trial by excluding relevant, voluntary and reliable evidence. U.S. Br. at 31-32. Claims that *Miranda* is "workable in practice," "not difficult to administer," and "generally workable," and that *Miranda* "generally does not hinder [law enforcement] investigations" are not true, serve only to mask the fact that the *Miranda* formula is *not* a benefit to law enforcement, and certainly do not justify the exclusion of voluntary statements on the basis of technical violations of *Miranda*. *Id.* at 32-35.

Law enforcement officers are professionals trained to obtain truthful information and sworn to abide by the Constitution. Officers investigate crimes and seek to find the perpetrator; no one seriously disputes that interrogations are an invaluable component in the law enforcement arsenal precisely because they are inherently reliable and often necessary to arrive at the truth. Even when investigated by the most qualified police investigators, it takes an admission or confession from the guilty individual, or information

obtained from other suspects, to solve many cases.[5] Thus, even if one rejects the premise that voluntary admissions of guilt yield moral benefits to the defendant, it is beyond question that the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (internal citation omitted).

The *Miranda* formula is the archetypal "technicality" which undermines confidence in the criminal justice system and brings it into disrepute. Voluntary, reliable confessions are excluded from evidence and withheld from the trier of fact for technical violations of *Miranda*, even when there is no suggestion of police overreaching, wrongdoing, or external coercion of any kind. A *Miranda* violation requires neither police overreaching *nor anything beyond a technical error:* "Even the forgetful failure to issue warnings to the most wary, knowledgeable, and seasoned of criminals will do." *Withrow*, 507 U.S. at 708-09 (O'Connor, J., dissenting). The law enforcement professional, whose sole purpose is apprehension of the true perpetrator of a crime and who is schooled in the requirements of the Constitution, can nonetheless be hoisted on the petard of mistake or inexactitude (such as the issue of "custody") even when no constitutional violation occurs.

---

[5] The contention of *Amici* Griffin B. Bell, *et al.*, that "[m]any defendants can be convicted without confession evidence," Bell *Amici* Br. at 7 n.3, overlooks, or side-steps, cases where the perpetrator may be the only witness capable of testifying (*e.g.*, murder, child molestation), as well as cases which never go to trial because the prosecutor deems the case "too weak" or "lacking in prosecutorial merit" without a confession. It further ignores the real social costs imposed as a consequence of "lost" confessions, gifts of leniency granted to culpable co-conspirators and cooperating witnesses, and cases where a confession would have significantly lessened the time and expense of the investigation. *See* Paul G. Cassell & Bret S. Hayman, *Dialogue on Miranda: Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906 (1996) (prosecutors report that 61 % of confessions are "essential" or "important" to the prosecution), *id.* at 911-15 (collecting data and finding statistically significant difference in outcome of cases depending on whether the suspect was successfully questioned).

Consequently, the substantial costs of excluding reliable evidence are incurred, with no corresponding benefit to an individual's constitutional rights.

As a result of *Miranda*, the law enforcement professional, no matter how careful, is faced with a phalanx of defense attorneys seeking to exclude voluntary, reliable confessions on the basis of a technicality. Neither the constitutional rights of a suspect nor the truth-seeking function of a trial are advanced thereby. Rather, this process, which may return dangerous criminals to the street, takes on the appearance of a game. *Amici* adamantly believe that society's knowledge that a confessed guilty person is set free because of inadvertent technical errors related to the *Miranda* warnings does not increase public confidence in the criminal justice system. Rather, the *Miranda* formula has been the cradle of the popular expression that someone "got off on a technicality," which reflects a well founded unease with the focus of the *Miranda* formula on a right to exclude voluntary confessions and its practical results in many cases.[6] Section 3501's focus on the

[6] How Petitioner and the Solicitor General can claim that jettisoning the rigid *Miranda* formula will erode "public confidence" in the criminal justice system we do not know, since neither cites any supporting authority for such claims. *See* Pet. Br. at 44, U.S. Br. at 10, 49. The experience of *amicis'* members and common sense suggest that the exact opposite is true. For examples of negative public perceptions regarding the societal impact of *Miranda*, see, e.g., Linda Chavez, *Hesitation Waltz at Justice*, WASH. TIMES, Oct. 7, 1999, at A18 ("The Justice Department can't make up its mind whether its job is to put dangerous criminals behind bars or to set them free on a technicality."); Ann Coulter, *Challenging Miranda*, CHATTANOOGA TIMES, Oct. 8, 1999, at B7 ("Though not admissible in state court, Roger's confession is admissible in federal court – if only Janet Reno would enforce the law. . . . Enacted in 1968 in response to *Miranda* . . . Section 3501 reiterates the constitutional standard."); Morgan Reynolds, *It's Time to Overturn Miranda*, CHICAGO TRIB., Dec. 5, 1999, at 23 ("The U.S. Supreme Court has a magnificent opportunity to overturn its worst criminal ruling ever – the so-called *Miranda* warning. During the 1960's, the . . . majority on Earl Warren's court legislated new rights – privileges really – to help criminal suspects. Chief among them, as most viewers of TV cop shows know, was the *Miranda* ruling."); Opinion, *Miranda Wrongs; Supreme Court to Revisit*

exclusion of only involuntary statements properly returns the focus of criminal proceedings to the important guarantees of the Fifth Amendment and so restores public confidence in the law.

In fact, perversions of justice based on technical *Miranda* violations, detailed at the OLP Report at 122, and remands and reversals for the same technical violations, reported in Cassell, *The Statute That Time Forgot,* at 253-254, bring to mind Justice White's prophetic dissent in *Miranda*:

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime when ever it pleases him . . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case."

384 U.S. at 542-543 (White, J., dissenting). Allowing Congress to adjust this dynamic within constitutionally permissible limits is hardly an affront to people's sensibilities.

B. The Supposed "Bright Line" Of The *Miranda* Formula Is Illusory, Creating Only A Chimera That Masks The Broad Range Of Issues That Still Remain In Any Application Of *Miranda*.

The *Miranda* formula is a one-way ratchet: failure to give

Landmark 1966 Ruling, SAN DIEGO TRIB., Dec. 8, 1999 ("[A] federal district court in Alexandria threw out [Dickerson's] voluntary confession. The FBI had obtained his admission of guilt before agents read him his Miranda rights. It appeared that Dickerson had beaten the rap on this technicality."); Ann Coulter, *We Can Do Nicely Without Miranda*, CHATANOOGA TIMES, Jan. 7, 2000, at B7 ("The Miranda warnings do not make things simpler, as is often claimed. They just give the guilty two bases on which to challenge a confession in the courts rather than one. With Miranda, confessed criminals can challenge not only whether they were given Miranda warnings at just the right time and under the proper circumstances, but also – even if they were – whether their confessions were voluntary. This is not a big time-saver. Instead of being on the street fighting crime, cops spend hours in court for suppression hearings.").

the warning results in exclusion of the statement, while recitation of the warnings does not guarantee the voluntariness or admissibility of the statement. ("*Miranda* can fail to exclude some truly involuntary statements: It is entirely possible to extract a compelled statement despite the most precise and accurate of warnings." *Withrow*, 507 U.S. at 712 (O'Connor, J. dissenting).)

The cost of the *Miranda* formula does not buy law enforcement professionals greater precision in complying with the Fifth Amendment than the "totality of the circumstances" test it supplanted. The *Miranda* formula is a bright line only in the sense that its requirements are facially straightforward and the warnings are either given or not given. However, a number of threshold issues must be addressed and decided on the spot by law enforcement officers. A misstep in regard to *Miranda* will be fatal to a prosecution, as the evidence will be excluded if a court determines, after the fact, that the officer's judgment was wrong. For example, issues that a court will decide include whether the suspect was in custody (so as to trigger *Miranda* requirements),[7] whether the warnings were given, and whether the waiver was knowing and voluntary. These issues are susceptible to more than one judgment:

> *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in "custody" has proved to be "a slippery one." And the supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from a waiver and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined.

---

[7] *See, e.g.*, J.F. Ghent, *What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring that Suspect be Informed of His Federal Constitutional Rights Before Custodial Interrogation*, 31 A.L.R.3d 565 (2000). This article traverses, in the course of over 500 pages, many hundreds of decisions from state and federal courts on a single question: whether an individual was in custody.

Id. at 711 (internal citations omitted). As an essential part of the *Miranda* inquiry, these questions are fact specific and often based on the "totality of the circumstances."[8] Thus, a "multiplicity of factors" that "might bear on the voluntariness inquiry," Bell *Amici* Br. at 14 & n.14, remain. *Miranda*'s "bright" line requires as many "tests" and inquiries as any totality-of-the-circumstances examination of voluntariness, and certainly poses no less a drain on judicial time, as Justices White, Harlan, and Stewart correctly foresaw in their dissent in *Miranda*. *Miranda*, 384 U.S. at 544-45 (White, J., dissenting).[9]

The failure of *Miranda's* one-size-fits-all template to really serve as the claimed "bright line" reflects the fact that both the human beings who commit crimes and the circumstances in which they commit them are extraordinarily diverse. Fairly evaluating a suspect's incriminating statement by the standards of the Fifth Amendment can be complex, and irreducibly so. Law enforcement will always demand sound judgment, exercised quickly under highly stressful and rapidly changing circumstances. The *Miranda* formula has been shown not to be up to this task.

---

[8] *See, e.g., United States v. Salvo*, 133 F.3d 943, 950 (6th Cir.) *cert. denied*, 523 U.S. 122 (1998) (weighing question of "custody" under the totality of the circumstances, citing factors); *Thasaphone v. Weber*, 137 F.3d 1041, 1043 (8th Cir.), *cert. denied*, 523 U.S. 1130 (1998) (same); *United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998) (determining validity of *Miranda* waiver under the totality of the circumstances); *United States v. Erving L.*, 147 F.3d 1240,1248 (10th Cir. 1998) (weighing question of "custody" under the totality of the circumstances, citing factors).

[9] *Cf. Duckworth*, 492 U.S. 195 at 207 (O'Connor, J. concurring) ("Eighteen state and federal judges have now given plenary consideration to respondent's *Miranda* claims. None of these judges has intimated any doubt as to respondent's guilt or the voluntariness and probative value of his confession."). Contrary to the Solicitor General's suggestion, U.S. Br. at 36, the totality-of-the-circumstances test would be hard-pressed to be *less* workable than *Miranda* proves in practice.

In contrast, section 3501 applies the Self-Incrimination Clause's voluntariness standard far more faithfully, effectively taking into account the real-world exigencies that can shape interrogation. The criticism that section 3501 is somehow more onerous or difficult for law enforcement to follow lacks support and credibility. *See, e.g.*, U.S. Br. 36-38. Just as *Miranda*'s "bright" line is a chimera, fallacious and illusory, the "onerous difficulty" of a true voluntariness inquiry evaporates upon reflection. The focus, after all, is solely on government coercion. Law enforcement professionals are well trained in the constitutional rights of suspects, and already deal with "totality-of-the-circumstances" analyses in many facets of their work. They seek only to obtain accurate, reliable, and voluntary statements. In doing so, they are well able to avoid overreaching and coercive police tactics. Section 3501 certainly opens those tactics to careful examination in court. As Justice Clark pointed out in dissent in *Miranda*:

> Rather than employing the arbitrary Fifth Amendment rule which the Court lays down I would follow the more pliable dictates of the Due Process Clauses . . . which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody.

384 U.S. at 503 (Clark, J., dissenting).

C. Modern Interrogation Techniques Further The Interest Of Society, While Protecting The Constitutional Rights Of Suspects.

Police officers are trained to exercise independent judgment in the fluid circumstances in which interrogation may occur and to avoid practices and situations that yield coerced or involuntary statements. Law enforcement officers are taught that coerced or involuntary statements are unreliable and that such statements violate the Constitution. As we have already pointed out, imposing *per se* prophylactic rules like the *Miranda* formula does not aid in the practical application of these principles.

Section 3501 properly focuses attention on the constitutional

requirements for criminal interrogations and on the interplay between law enforcement officers, suspects, and the truth. The Constitution does not require that a criminal suspect know and understand every possible consequence of waiving the Fifth Amendment privilege outside of a courtroom. *Colorado v. Spring*, 479 U.S. 564, 574 (1987). Further, the "relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers." *Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2052 (1999). Interviews and interrogations, when properly conducted, seek the truth and do not constitute an abusive practice: "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."[10] Law enforcement officers are not required to inform an individual of all information relevant or useful in making a decision whether to confess,[11] and "voluntary disclosure of a guilty secret" does not qualify as state compulsion.[12] The focus of law enforcement is to elicit truthful, reliable information within the constraints of the Constitution, in furtherance of investigating crimes, clearing innocent suspects, and convicting the guilty.

Interview and interrogation techniques that obtain voluntary, probative statements from suspects in accordance with constitu-

---

[10] *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). While the "inherent compulsion" of interrogation by "law enforcement" was absent in Perkins, absent some actual showing of psychological or physical compulsion, promises, threats, or inducements, being interviewed by a law enforcement professional is not sufficiently "coercive" to result in a constitutional violation.

[11] *See, e.g.*, *Spring*, 479 U.S. at 576; *Moran v. Burbine*, 475 U.S. 412, 422 (1986).

[12] *Elstad*, 470 U.S. at 312.

tional requirements are stressed and utilized by law enforcement professionals throughout the country. Fred E. Inbau and John E. Reid pioneered the study of this field, developing the contemporary techniques of persuasion used in the interrogation of suspects. We recognize that the five justice majority in *Miranda* extensively criticized the techniques described in FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) as representative of "inherently coercive" police procedures which "trade[ ] on the weakness of individuals." 384 U.S. at 455. Law enforcement's search for truth and inherent skepticism towards uncorroborated confessions were conveniently glossed over by the *Miranda* Court and are still ignored by other wholesale critics of police interrogation. Further, a fair reading of the procedures suggested by Inbau and Reid – reviewed free of "a deep-seated distrust of all confessions," 384 U.S. at 537 (White, J., dissenting) – yields the conclusion that there is nothing in these techniques that is inherently offensive to the guarantees of the Fifth Amendment.

Most importantly, none of the techniques would induce a balanced, innocent person to confess to a crime. As stated in the acknowledged "handbook," FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3rd ed. 1986) ("INBAU"):

> [W]e are unalterably opposed to the so-called "third degree," even on suspects whose guilt seems absolutely certain and who remain steadfast in their denials. Moreover, we are opposed to the use of *any* interrogation tactic or technique that is apt to make an innocent person confess. We are opposed, therefore, to the use of force, threats of force, or promises of leniency – any of which might well induce an innocent person to confess.

INBAU at xiv. The objective of an interrogation, simply speaking,

is to learn the truth.[13]

Inbau stresses the primacy of voluntary confessions to the truth-seeking process. The practitioner is warned even against indirect physical harms such as "unduly prolonged, continuous interrogation, especially by two or more interrogators working in relays, or the deprivation of food, water, or access to toilet facilities." INBAU at 214. The "trickery" within an interrogation is within societally accepted norms, is not an issue of constitutional import, and does not affect the voluntariness of a confession. Given the wide acceptance of the Inbau and Reid techniques, Inbau's emphasis upon learning the truth through constitutionally permissible means should obviate any concerns about systemic law enforcement overreaching.

---

[13] *Amicus* American Civil Liberties Union ("ACLU") suggests that there is something untoward about not conducting an interrogation in a public place, and cites several "psychological studies" in support of its allegation that "tactics still endorsed in the interrogation manuals tend to promote false or untrustworthy confessions by implanting notions of guilt or implying leniency." Brief of *Amicus Curiae* the American Civil Liberties Union in Support of Petitioner at 15-16. Unexplained is how the studies prove *anything* about the actual interrogation of individuals suspected of often heinous crimes. *See, e.g.*, Saul M. Kassin & Katherine L. Kiechel, *Police Interrogations and Confessions: Communicating Promises by Pragmatic Implication*, 15 PSYCHOL. SCI. 233 (1991) (study concludes that an interrogation theme has the same psychological effect as a direct promise of leniency *based on student's estimate of how long fictitious suspects would be sentenced for based on a reading of fictitious trial transcripts*); Saul M. Kassin & Katherine L. Kieche, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL SCI. 125, (study concludes that accusations of guilt will cause innocent individual to believe they are guilty *based on students being told that if they pressed an ALT keyboard on a computer keyboard the computer would shut down*; students continued to type and the computer did shut down and 69% of the students subsequently signed a false confession where they admitted they pressed the ALT key) (One's lack of certainty regarding striking the ALT key would presumably be greater than whether one committed an affirmative, criminal offense.). *See* BRIAN C. JAYNE & JOSEPH P. BUCKLEY, THE INVESTIGATOR ANTHOLOGY 459-469 (1999) (rejecting the theories and conclusions espoused by the studies cited by the ACLU).

III. UNLIKE OTHER "PROPHYLACTIC" HOLDINGS OF THE COURT, THE *MIRANDA* FORMULA HAS NEVER BEEN HELD TO BE REQUIRED BY THE CONSTITUTION.

We agree with the Fourth Circuit that *Miranda* does not impose a constitutional requirement, but rather an extraconstitutional prophylactic rule that sweeps more broadly than the Fifth Amendment's right against compelled self-incrimination. The Solicitor General claims that "prophylactic" rules in many different contexts are not at all unusual, as if that fact somehow supports an argument that *Miranda* itself has a constitutional weight which precludes admission of non-*Mirandized* statements – even where there is no violation of the defendant's Fifth Amendment rights. Yet, careful reading of these other "prophylactic" cases reveals that the rule articulated in each instance is actually an expression of a constitutional requirement – not a "framework" fashioned by the Court to "sweep more broadly" than the underlying constitutional right. Arguments to the contrary fail to distinguish between rights established by pertinent provisions of the Constitution as interpreted by this Court, and the extraconstitutional exclusionary rule imposed by *Miranda*.

The fact that certain procedures determined to be *one* means of satisfying constitutional requirements are sometimes described as "prophylactic" does not change the fact that *Miranda*'s prophylactic rule is not a constitutional requirement. For example, the Solicitor General's reliance on a number of this Court's cases involving effective appellate representation for indigents to support its argument is unavailing. The Court's decisions regarding the right to such representation involve the straightforward review of whether particular procedures satisfy constitutional requirements. Thus, in *Anders v. California*, 386 U.S. 738 (1967), the Court found that a state procedure for withdrawal of appointed appellate counsel was unconstitutional and suggested a procedure that would satisfy such requirements. In *Smith v. Robbins*, 120 S. Ct. 746 (2000), the Court recognized that a later California procedure, which differed in material respects from the *Anders* procedure, also satisfied constitutional requirements. Although *Robbins*

referred to *Anders* procedures as "prophylactic," *id.* at 13, 28, it made clear that adequate safeguards to assure that an appeal is adequate and effective are constitutionally required:

> [T]he *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals . . . . We think it clear that California's system does not violate the Fourteenth Amendment . . . . we cannot say that it fails to afford to indigents the adequate and effective appellate review that the Fourteenth Amendment requires.

Id. at 759-60.

The question in *Anders* and *Robbins* was not *whether* procedural protections for the defendant were constitutionally required, but rather, whether specific procedures were constitutionally adequate. In contrast, the *Miranda* procedures are not constitutionally required to comply with the Fifth Amendment. In determining the propriety of changing procedures through legislation, the question is whether a constitutional provision requires some procedures. If not, passing references to the phrase "prophylactic rule" cannot preclude a legislative response which replaces judicially-crafted procedures.

Similarly, because Miranda's *per se* rule does not protect an underlying constitutional right, this Court's holding that due process may require a *per se* rule in other contexts does not elevate *Miranda* to constitutional dimensions. Petitioner and the Solicitor General attempt to disregard the clear holdings of these decisions on the ground that the evils these rules aim to prevent do not invariably occur if the rules are not observed. In their view, it then follows that these are not constitutional due process rules – notwithstanding the Court's explicit holdings that they are. Thus, Petitioner's and the Solicitor General's references to the *per se* rule in *North Carolina v. Pearce*, 395 U.S. 711 (1969), described in later cases as "prophylactic," does not detract from the fact that the rule in *Pearce* (holding that an articulated non-vindictive reason must be provided for an increased sentence following a successful appeal) is required as a matter of constitutional due proc-

ess:

> We . . . consider . . . what *constitutional limitations* there may be upon the imposition of a more severe sentence after reconviction. . . . Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, *due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge*. . . . In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Id. at 717, 725-26 (emphasis added).

The logical extension of this rule in *Blackledge v. Perry*, 417 U.S. 21 (1974), which held that a state may not respond to a defendant's seeking a trial *de novo* in a two-tier system by charging a more serious offense, both affirmed the constitutional underpinning of *Pearce* and further emphasized:

> *Due process of law requires* that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was *not constitutionally permissible* for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*.

417 U.S. at 28-29 (emphasis added).

In sum, the cases cited by Petitioner, the Solicitor General and various *amici* are inapposite to the issues raised by the extra-constitutional prophylactic rule of *Miranda*. In each such case, this Court determined that the Constitution required the proce-

dures or *per se* rules mandated therein.[14] For instance, it is this Court's determination that the rules in *Pearce* and *Blackledge* are required by due process which give them constitutional weight; the fact they exist as *per se* rules does not negate the fact that those decisions implement constitutional requirements, as interpreted by this Court, rather than impose judicially-crafted prophylactic rules which are not required by the Constitution.

In contrast, the *Miranda* warnings have never been understood to be themselves required by the Fifth Amendment.[15] Thus, the *Miranda* rules cannot be understood as due process requirements on the model of *Pearce* and *Blackledge*, or as constitutionally required procedures on the model of *Anders* or *Robbins*. Neither are those cases demoted to extraconstitutional status, like *Miranda*, because they are sometimes *described* as prophylactic. While procedures or rules may be prophylactic in the sense that they protect against certain violations of defendants' rights or other evils, the determination of constitutional status is made by reference to what the Constitution *requires*. In the absence of this Court holding that a procedure or rule is constitutionally required, the legislative branch retains its primacy over policy matters.

---

[14] *See also Bruton v. United States*, 391 U.S. 123, 137 (1968) (non-hearsay admission of nontestifying co-defendant's confession violates Sixth Amendment as a limiting instruction and inadequate "substitute for *petitioner's constitutional right of cross-examination*.") (emphasis added); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (privilege immunizing honest misstatements of fact "is *required by the First and Fourteenth Amendments*.") (emphasis added); *Gertz v. Welch*, 418 U.S. 323, 341 (1974) ("The *First Amendment requires* that we protect some falsehood in order to protect speech that matters.") (emphasis added). Other cases cited are similarly distinguishable from *Miranda* by this Court's determination that the decisions were *required* by specific constitutional provisions.

[15] *See United States v. Dickerson*, 166 F.3d 667, 688 (4th Cir. 1999) (citing cases).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

Robert J. Cynkar*
Margaret A. Ryan
Cooper, Carvin & Rosenthal, PLLC
1500 K Street, N.W., Suite 200
Washington, DC 20005
202-220-9655, 220-9601 (fax)

*Counsel of Record for *Amici Curiae*

Stephen R. McSpadden
General Counsel
National Association of Police Organizations
750 First Street, N.E., Suite 920
Washington, D.C. 20002

Edward J. Smith
General Counsel
International Brotherhood of Police Officers
317 South Patrick Street
Alexandria, VA 22305

Lawrence Berger
Mahon & Berger
350 Old Country Rd., Suite 101
Garden City, NY 11530
(General Counsel, for the Federal Law Enforcement Officers Association)

Date: March 9, 2000

Mar 9 2000

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

RICHARD M. ROMLEY
Maricopa County Attorney
PAUL AHLER
Chief Deputy
MARICOPA COUNTY
ATTORNEY'S OFFICE
301 W. Jefferson Street
Phoenix, Arizona 85003
(602) 506-3800

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
MIGUEL A. ESTRADA
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

BEST AVAILABLE COPY

37pp

QUESTION PRESENTED

Whether 18 U.S.C. § 3501, which requires the admission in evidence of any confession that is found by the trial court to be "voluntary," violates the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT 2

A. The Law of Confessions Before *Miranda*: "Voluntariness" And *McNabb-Mallory* 2

B. The *Miranda* Decision 4

C. Congressional Response To *Mallory* And *Miranda*: 18 U.S.C. § 3501 5

D. Proceedings Below 8

SUMMARY OF ARGUMENT 10

ARGUMENT 12

THE FIFTH AMENDMENT DOES NOT REQUIRE *MIRANDA*'S EXCLUSIONARY RULE 12

A. This Court Has Rejected The Proposition That *Miranda* Is Required By The Fifth Amendment 13

B. This Court's Substantive Due Process Decisions Are Inconsistent With The Proposition That *Miranda* Defined The Fifth Amendment 20

C. That This Court Has Ruled On *Miranda* Issues In State Cases Does Not Establish That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule 21

D. *Miranda* Itself Invited Congress And The States To Develop Their Own Approaches To The Admissibility Of Custodial Confessions 23

E. If This Court Concludes That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule, The Court Should Do So Itself 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 26
Albright v. Oliver, 510 U.S. 266 (1994) 20, 21
Alston v. United States, 348 F.2d 72 (D.C. Cir. 1965) 4
Anders v. California, 386 U.S. 738 (1967) 24
Arizona v. Fulminante, 499 U.S. 279 (1991) 16, 27
Arizona v. Roberson, 486 U.S. 675 (1988) 15
Ashcraft v. Tennessee, 322 U.S. 143 (1944) 2
Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 11, 22
Bram v. United States, 168 U.S. 532 (1897) 11, 15
Brogan v. United States, 522 U.S. 398 (1998) 28
Brown v. Allen, 344 U.S. 443 (1953) 25
Brown v. Mississippi, 297 U.S. 278 (1936) 2
Carlson v. Green, 446 U.S. 14 (1980) 22
City of Boerne v. Flores, 521 U.S. 507 (1997) 12, 28, 29, 30
Coleman v. Thompson, 501 U.S. 722 (1991) 30
Colorado v. Connelly, 479 U.S. 157 (1987) 2
Colorado v. Spring, 479 U.S. 564 (1987) 25
Connecticut v. Barrett, 479 U.S. 523 (1987) 15
Counselman v. Hitchcock, 142 U.S. 547 (1892) 16
County of Sacramento v. Lewis, 523 U.S. 833 (1998) 11, 21
Crane v. Kentucky, 476 U.S. 683 (1986) 25
Davis v. Passman, 442 U.S. 228 (1979) 22
Duckworth v. Egan, 492 U.S. 195 (1989) 15, 23
Edwards v. Arizona, 451 U.S. 477 (1981) 27
Escobedo v. Illinois, 378 U.S. 478 (1964) 4
Fisher v. United States, 425 U.S. 391 (1976) 14

TABLE OF AUTHORITIES—*Continued*

Page(s)

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) 29
Garner v. United States, 424 U.S. 648 (1976) 14
Graham v. Connor, 490 U.S. 386 (1989) 20
Harris v. New York, 401 U.S. 222 (1971) 10, 17, 18
Hoffa v. United States, 385 U.S. 293 (1966) 14
Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 22
Jackson v. Denno, 378 U.S. 368 (1964) 8
Kastigar v. United States, 406 U.S. 441 (1972) 11, 17
Katzenbach v. Morgan, 384 U.S. 641 (1966) 28
Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 29
Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) 28
Leyra v. Denno, 347 U.S. 556 (1954) 2
Lynumn v. Illinois, 372 U.S. 528 (1963) 2
Mallory v. United States, 354 U.S. 449 (1957) 3
Malloy v. Hogan, 378 U.S. 1 (1964) 4
McNabb v. United States, 318 U.S. 332 (1943) 3
McNeil v. Wisconsin, 501 U.S. 171 (1991) 2
Michigan v. Harvey, 494 U.S. 344 (1990) 18
Michigan v. Tucker, 417 U.S. 433 (1974) 5, 15
Mincey v. Arizona, 437 U.S. 385 (1978) 11, 20
Minnesota v. Murphy, 465 U.S. 420 (1984) 14, 15
Minnick v. Mississippi, 498 U.S. 146 (1990) 27
Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*
Moran v. Burbine, 475 U.S. 412 (1986) 4
New Jersey v. Portash, 440 U.S. 450 (1979) 17, 18

TABLE OF AUTHORITIES—*Continued*

Page(s)

New York v. Quarles, 467 U.S. 649 (1984) 10, 15, 18
North Carolina v. Butler, 441 U.S. 369 (1979) 27
Oregon v. Elstad, 470 U.S. 298 (1985) 10, 14, 15, 19, 20
Oregon v. Hass, 420 U.S. 714 (1975) 18
Payne v. Tennessee, 501 U.S. 808 (1991) 26
Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) 17
Rostker v. Goldberg, 453 U.S. 57 (1981) 13, 27
Schall v. Martin, 467 U.S. 253 (1984) 27
Smith v. Robbins, 120 S. Ct. 746 (2000) 11, 23, 24
State Oil Co. v. Khan, 522 U.S. 3 (1997) 30
Ullmann v. United States, 350 U.S. 422 (1956) 17
United States ex rel. Vatjauer v. Commissioner of Immigration, 273 U.S. 103 (1927) 14
United States v. Balsys, 524 U.S. 666 (1998) 17
United States v. Gaudin, 515 U.S. 506 (1995) 26
United States v. Lanier, 520 U.S. 259 (1997) 21
United States v. Monia, 317 U.S. 424 (1943) 14, 19
United States v. Shabani, 513 U.S. 10 (1994) 22
United States v. Washington, 431 U.S. 181 (1977) 14
Webster v. Fall, 266 U.S. 507 (1925) 22
White v. Texas, 310 U.S. 530 (1940) 2
Withrow v. Williams, 507 U.S. 680 (1993) 21

CONSTITUTION, STATUTES AND RULES

U.S. CONST. amend. V ..... *passim*
U.S. CONST. amend. VI 4
U.S. CONST. amend. XIV, § 1 2
U.S. CONST. amend. XIV, § 5 ..... 23, 28
18 U.S.C. § 3501 ..... *passim*

TABLE OF AUTHORITIES—*Continued*

Page(s)

18 U.S.C. § 3501(a) 8, 24
18 U.S.C. § 3501(b) 2
18 U.S.C. § 3501(b)(1) 8, 25
18 U.S.C. § 3501(b)(2) 25
18 U.S.C. § 3501(b)(2)-(5) 8
18 U.S.C. § 3501(c) 25
18 U.S.C. § 6002 17
Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210 5
Fed. R. Crim. P. 5 ..... 3, 5, 25
SUP. CT. R. 37.3(a) 1
SUP. CT. R. 37.6 1
ARIZ. REV. STAT. § 13-3988A 1
ARIZ. REV. STAT. § 13-3988B 2

OTHER AUTHORITIES

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) 28
S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 ..... 3, 6, 7

BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF AMICUS CURIAE[1]

The question presented in this case is whether 18 U.S.C. § 3501, which requires trial courts to admit voluntary confessions in evidence, comports with the Fifth Amendment. Amicus curiae Maricopa County Attorney's Office is the largest prosecutors' office in the State of Arizona, and it initiated the prosecution that culminated in this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Maricopa County prosecutors have experienced the adverse effects of *Miranda*'s rigid exclusionary rule in ways that may not be apparent to this Court from an examination of reported cases alone. Because prosecutors must make charging decisions on the basis of the legally admissible evidence likely to be available at trial, Maricopa County prosecutors have foregone bringing charges, or have brought reduced charges pursuant to plea bargains, in cases in which officers failed to comply with the technical requirements imposed by *Miranda*.

Arizona, like the United States, has enacted a statute that would ameliorate those untoward consequences of the *Miranda* regime. Like Section 3501, Arizona's statute provides that "[i]n any criminal prosecution * * *, a confession shall be admissible in evidence if it is voluntarily given." ARIZ. REV. STAT. § 13-3988A. Arizona law instructs trial judges to consider all relevant circumstances in determining voluntariness, and it expressly highlights for the court's consideration the same factors

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus Maricopa County Attorney's Office states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

set forth at 18 U.S.C. § 3501(b). *See* ARIZ. REV. STAT. § 13-3988B. Because this Court's ruling in this case will affect the constitutionality of that parallel Arizona statute, amicus has a vital interest in the correct resolution of this case.

STATEMENT

A. The Law of Confessions Before *Miranda*: "Voluntariness" And *McNabb-Mallory*

1. Voluntary confessions "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (internal quotation marks omitted). The Court has long recognized, however, that confessions may sometimes be produced by tactics that offend federal law.

Beginning with *Brown v. Mississippi*, 297 U.S. 278 (1936), a case in which a confession had been obtained by the use of beatings and other physical torture, the Court consistently relied on the Due Process Clause of the Fourteenth Amendment to rule that coerced confessions may not be admitted in evidence. Although the Court's initial rulings dealt with confessions produced by physical brutality or its threat, *e.g.*, *White v. Texas*, 310 U.S. 530, 532 (1940) (beatings); *Ashcraft v. Tennessee*, 322 U.S. 143, 147 (1944) ("fear of violence at the hands of a mob"), the Court's "voluntariness" analysis also came to encompass confessions that were coerced by improper psychological ploys—*i.e.*, ploys that unfairly exploited those characteristics of a suspect that rendered him less able to exercise free will. *E.g.*, *Leyra v. Denno*, 347 U.S. 556 (1954) (abuse of physician-patient relationship to extract confession); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (defendant offered leniency and the opportunity to retain her two young children and welfare assistance). In sum, the Court's "voluntariness" doctrine recognized that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, [were] so offensive to a civilized system of justice" that they could not be reconciled with due process. *Colorado v. Connelly*, 479 U.S. 157, 163 (1987) (internal quotation omitted).

2. Although this Court's "voluntariness" cases addressed the admissibility of confessions in State cases solely by insisting on observance of the basic requirements of due process, the Court adopted a different approach with respect to confessions introduced in federal prosecutions. In *McNabb v. United States*, 318 U.S. 332, 341 (1943), "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," the Court mandated exclusion of confessions that had been obtained during custodial interrogation—if the defendant's custody violated the rule (now set forth in FED. R. CRIM. P. 5) that requires an arrested person to be taken before a magistrate without undue delay. *McNabb* explained that the purpose of that prompt-presentment rule, to be vindicated by the new suppression remedy, was to "check[] resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." 318 U.S. at 344.

The *McNabb* rule reached its apogee in *Mallory v. United States*, 354 U.S. 449 (1957), where the Court reversed the defendant's rape conviction and death sentence solely because of a delay in presentment. The defendant in *Mallory* had been presented to a magistrate the morning immediately following the afternoon on which he was arrested, and he had confessed in the interim. *Id.* at 450-51. The *Mallory* Court explained the rationale for the *McNabb* exclusionary rule by pointing to FED. R. CRIM. P. 5, which requires (in language now found in Rule 5(c)) that, upon presentment, a defendant be advised that he has a right to counsel, that he need not make any statement, and that any statement he does make may be used against him. *Id.* at 453-54. The Court believed that the arresting officers improperly deprived Mallory of the safeguard provided by that "judicial caution" by delaying his appearance before a magistrate in order to obtain a confession. *Id.* at 455.

The lower federal courts construed *Mallory* quite strictly, ruling that delays in presentment as short as a few minutes warranted suppression of a defendant's confession. Indeed, in a case that later became a focus of congressional concern, *see* S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124-25, a confession given within five

minutes of arrest was ordered suppressed under the *McNabb-Mallory* rule even though the arresting officers had advised the defendant that "he need make no statement and if he did it would be used against him." *Alston v. United States*, 348 F.2d 72, 73 (D.C. Cir. 1965) (opinion of Bazelon, C.J.).

B. The *Miranda* Decision

Seven years after its decision in *Mallory*, this Court concluded in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment's privilege against compelled self-incrimination is binding on the States through the Due Process Clause of the Fourteenth Amendment. That ruling provided an essential predicate for *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court held for the first time that the Fifth Amendment privilege may be implicated when State authorities question a suspect who is in police custody.[2]

1. The *Miranda* Court concluded that custodial interrogation can generate "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. To counteract those pressures, the Court devised a set of prophylactic rules intended to safeguard the Fifth Amendment privilege in the context of custodial interrogation. In particular, the Court held that police must advise a suspect that he has the right to remain silent, that he has the right to consult with counsel and to have such counsel present during interrogation, and that counsel can be appointed for the suspect if he is indigent. Police must also

[2] Between its decisions in *Mallory* and *Miranda*, the Court decided *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* ruled a custodial confession inadmissible on the ground that, in the circumstances of that case, the suspect's interrogation violated his Sixth Amendment right to the "Assistance of Counsel." The Court later disavowed *Escobedo*'s Sixth Amendment rationale, and "in retrospect perceived that the prime purpose of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, to guarantee full effectuation of the privilege against self-incrimination." *Moran v. Burbine*, 475 U.S. 412, 429-30 (1986) (internal quotation marks omitted).

advise a suspect that if he waives those rights, anything he says can be used against him in Court. *Id.* at 467-73. Those warnings largely parallel the "caution" that a judicial officer must give the defendant under FED. R. CRIM. P. 5. Indeed, the *Miranda* Court stated that the "prophylaxis" created by the *McNabb-Mallory* exclusionary rule, while anchored in the Court's "supervisory" authority, was "nonetheless responsive to the same considerations of Fifth Amendment policy" that prompted its *Miranda* ruling. *Id.* at 463.

2. As the Court's concern with the *risk* of compelled self-incrimination made clear, the warnings prescribed by *Miranda* were "not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Indeed, *Miranda* itself expressly invited Congress and State legislatures to devise other procedures for protecting the privilege (384 U.S. at 467):

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

C. Congressional Response To *Mallory* And *Miranda*: 18 U.S.C. § 3501

Congress reacted to this Court's rulings in both *Mallory* and *Miranda* with Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210. The Senate Judiciary Committee conducted extensive hearings on the

subject and formulated the provisions relating to the admissibility of confessions that are now codified at 18 U.S.C. § 3501.

The Senate Judiciary Committee Report that accompanied the legislation made clear that Section 3501 was intended to supersede the inflexible exclusionary rules invoked by this Court in *McNabb*, *Mallory* and *Miranda*. Based on "the mass of evidence" adduced during hearings, the Judiciary Committee became "convinced * * * that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement." 1968 U.S.C.C.A.N. at 2132. The same was true, the Committee believed, with respect to the *McNabb-Mallory* rule, which imposed "a very high price * * * for a 'constable's blunder.'" *Id.* at 2124. In particular, "[i]nstance after instance [was] documented * * * where the most vicious criminals ha[d] gone unpunished, even though they had voluntarily confessed their guilt." *Id.* at 2132; *see also ibid.* ("testimony and statements from district attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country[] demonstrat[e] beyond doubt the devastating effect upon the rights of society of the *Miranda* decision").[3]

The Judiciary Committee's hearings also revealed "that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for the [Court's] opinion in *Miranda* [were]

---

[3] Indeed, "the testimony of many witnesses, and statements and letters of many other interested parties," persuaded the Committee that the decisions in *Mallory* and *Miranda* had

> resulted in the release of criminals whose guilt is virtually beyond question. This has had a demoralizing effect on law-enforcement officials whose efforts to investigate crimes and interrogate suspects have been stymied by th[ose] technical roadblocks * * *. The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims. For example, the infamous Mallory was convicted on another rape charge shortly after his rape conviction was reversed by the Supreme Court.

1968 U.S.C.C.A.N. at 2127.

not a correct portrayal of what actually goes on in police stations across the country." 1968 U.S.C.C.A.N. at 2134 (citing testimony from Arlen Specter, then District Attorney for Philadelphia, Pennsylvania). To the contrary, the Committee found that "cases of police using coercive tactics" were "isolated" and very much "the exception rather than the rule." *Ibid.* Because coercive police practices that "might have been approved 30 years ago" were no longer in use, the Committee concluded that this "Court overreacted to defense claims that police brutality is widespread." *Ibid.*

That record led the Committee to conclude that the traditional "voluntariness" inquiry should govern the admissibility of all custodial confessions in federal court. The Committee noted that "[s]ince the *McNabb-Mallory* rule was formulated in the exercise of the Supreme Court's supervisory powers * * * and has never been considered a constitutional requisite, no constitutional obstacle is imposed in the way of its legislative repeal." 1968 U.S.C.C.A.N. at 2126 (quoting testimony from Thomas C. Lynch, Attorney General of California). With respect to *Miranda*, the Committee noted that "a few ha[d] expressed" doubts about Congress's authority to overturn *Miranda*'s exclusionary rule, but that "the vast majority of the witnesses" who testified on the issue "expressed no doubt as to the constitutionality" of legislation requiring admission of all voluntary confessions, since this Court expressly contemplated that Congress could legislate in the area and "[v]oluntary confessions have been admissible in evidence since the early days of the Republic." 1968 U.S.C.C.A.N. at 2137, 2124. The Committee also noted that Congress has the "power to prescribe rules of evidence in Federal courts," and that, by conducting hearings, it is "possible for Congress to examine all the facets of human experience that must be taken into account in solving the problem of confessions"; whereas courts "consider[] only the limited facts and issues of each particular case [and] do not have the opportunity to evaluate all these factors." *Id.* at 2133.

Congress adopted the Committee's view by enacting Section 3501 of Title 18. Subsection (a) of the statute repudiates the rigid exclusionary rules laid down in *McNabb*, *Mallory* and

Miranda by providing that, in any federal prosecution, "a confession * * * shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). Subsection (a) goes on to endorse this Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), by requiring that the trial judge determine the issue of voluntariness outside the hearing of the jury. In addition, subsection (a) gives the defendant a second opportunity to challenge the voluntariness of his confession by requiring that the jury be permitted to assess the voluntariness issue independently.

Subsection (b) provides that, in determining the issue of voluntariness, the trial judge must take into consideration all relevant circumstances, and further emphasizes five specific factors. In deference to the concerns articulated by this Court in the *McNabb-Mallory* cases, the trial court must consider the time between arrest and arraignment, if the confession occurred after arrest and before arraignment. *See* 18 U.S.C. § 3501(b)(1). In deference to the concerns articulated by this Court in *Miranda*, the trial court must also consider whether the defendant knew the nature of the offense of which he was suspected when he made his confession; whether the defendant knew that he was not required to make a statement and that any statement could be used against him; whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and whether the defendant was without counsel when he was questioned. *See* 18 U.S.C. § 3501(b)(2)-(5).

D. Proceedings Below

1. On January 24, 1997, the First Virginia Bank in Alexandria, Virginia, was robbed at gunpoint. A witness took down the license plate for the getaway car, which was traced to petitioner. J.A. 36-37.

A team of FBI agents and local police visited petitioner at his apartment in Takoma Park, Maryland. Although petitioner refused the agents consent to search his apartment, he agreed to accompany them to the FBI's Washington, D.C., field office, where he was interviewed by FBI Special Agent Lawlor and Alexandria Detective Durkin. J.A. 37, 167-68. In that initial interview, petitioner admitted only that, on the morning of the

bank robbery, he had parked his car in the Old Town area of Alexandria in order to purchase a bagel. *Id.* at 43, 168. Because that admission placed petitioner and his car near the scene of the robbery, Agent Lawlor left the interview room to obtain (by telephone) a warrant to search petitioner's apartment for evidence of the bank robbery. *Ibid.* Agent Lawlor then returned to the interview room and told petitioner that his apartment would be searched. *Id.* at 44-45, 170.[4]

There was conflicting testimony at the suppression hearing about what occurred next. Agent Lawlor testified that petitioner was advised of his rights under *Miranda* and that petitioner waived those rights before he proceeded to describe how, on the morning of the robbery, he had been in Old Town with one Jimmy Rochester, whom petitioner knew to be a bank robber. According to Agent Lawlor, petitioner claimed that Rochester had put something in the trunk of petitioner's car, and that he had asked petitioner to run a red light as they drove away. Petitioner also claimed that Rochester had given him a pistol and dye-stained money. J.A. 45-47, 49-50, 170. Petitioner, on the other hand, testified that he made those statements *before* he was advised of his *Miranda* rights. *Id.* at 61, 171-72.

2. The district court credited petitioner's testimony that he received *Miranda* warnings only after he had confessed, and it accordingly suppressed petitioner's statements. J.A. 154-55. The court also concluded, however, that petitioner's statements were voluntary, and for that reason it refused to suppress evidence found as a result of the statements. *Id.* at 158 n.1, 212.

The government sought reconsideration, contending, *inter alia*, that Section 3501 required admission of petitioner's voluntary statements "even if *Miranda* warnings were required and not timely given." *Id.* at 94-95. The court denied the government's motion without addressing Section 3501. *Id.* at 157-61.

---

[4] The search of petitioner's apartment revealed "a silver .45-caliber handgun [like the one used in the robbery], dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves." J.A. 170.

3. The court of appeals reversed. J.A. 162-225. The court found it "perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court." *Id.* at 163, 197. In finding that Congress has the power to overrule *Miranda*'s inflexible exclusionary rule, the court noted that the *Miranda* opinion never "refer[s] to the warnings as constitutional rights," and that this Court "consistently (and repeatedly) has referred to the warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution.'" *Id.* at 203 (citations omitted).

After surveying the history of *Miranda*'s application by this Court—especially this Court's refusal to apply the "tainted fruits" doctrine to evidence obtained as a result of unwarned confessions—the court of appeals held that "the irrebuttable presumption created * * * in *Miranda* * * * is *a fortiori* not required by the Constitution." J.A. 207. The court further concluded that the voluntariness standard in Section 3501 will not "provide[] those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings" because "providing the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness." *Id.* at 210-11. Because the district court had already determined that petitioner's statements were voluntary, the court of appeals reversed the district court's order suppressing them. *Id.* at 212, 217.

SUMMARY OF ARGUMENT

Congress acted well within its constitutional authority in enacting 18 U.S.C. § 3501, because *Miranda*'s exclusionary rule is neither an interpretation of the Fifth Amendment nor otherwise required by the Constitution. Although *Miranda* itself suggested that the Court was interpreting the Fifth Amendment, that view is inconsistent with the traditional understanding of "compulsion," to which this Court has continued to adhere, and with many post-*Miranda* cases that have expressly disclaimed a constitutional basis for *Miranda,* particularly *Harris v. New York*, 401 U.S. 222 (1971), *New York v. Quarles*, 467 U.S. 649 (1984), and *Oregon v. Elstad*, 470 U.S. 298 (1985). Those

post-*Miranda* cases permit use of statements obtained in violation of *Miranda*, among other things, to impeach the defendant and to secure other evidence against him. Because the Fifth Amendment requires exclusion of *all* evidence derived from compelled testimony and forbids using such evidence even for impeachment, *see, e.g.*, *Kastigar v. United States*, 406 U.S. 441 (1972), this Court necessarily has held that *Miranda*'s exclusionary rule does not remedy any Fifth Amendment violation. Indeed, this Court has expressly repudiated the standard for compulsion embraced by *Bram v. United States*, 168 U.S. 532 (1897), the case on which the *Miranda* Court based its conclusion. *Miranda*, 384 U.S. at 461.

Moreover, if *Miranda* were required by the Fifth Amendment, as petitioner and the Solicitor General contend, it would create another anomaly—this one in this Court's substantive due process jurisprudence. It is clear that a claim is not to be analyzed under substantive due process if it is "covered by a specific constitutional provision." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Yet this Court has held that a defendant who received *Miranda* warnings may nevertheless seek to suppress his statements on the ground that they were "involuntary" under substantive due process standards. *Mincey v. Arizona*, 437 U.S. 385 (1978).

The fact that this Court has applied *Miranda* to the States and allowed it to be raised in habeas proceedings does not establish that *Miranda*'s exclusionary rule is required by the Fifth Amendment. This Court has never expressly addressed the basis of its authority to apply *Miranda* to the States, and has, in any event, rejected the notion that Congress lacks authority to provide remedies for violation of the Constitution that are different from those prescribed by this Court. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Congress surely must possess similar power to create alternatives to prophylactic rules that guard against the mere *risk* of a constitutional deprivation.

Indeed, as this Court recently made clear in *Smith v. Robbins*, 120 S. Ct. 746 (2000), judicially created prophylactic

rules—even rules devised in State cases and consistently applied by this Court to the States—may be modified so long as the underlying constitutional right is vindicated. *Miranda* itself invited Congress and the States to develop their own alternative approaches to the admissibility of custodial confessions, and disclaimed any intent to create a "constitutional straitjacket" that would "handicap sound efforts at reform." *Miranda*, 384 U.S. at 467. If, as the parties essentially contend, no alternative is permissible that does not incorporate *Miranda*'s scheme of mandatory warnings and an inflexible exclusionary rule, the Court's invitation would be largely meaningless.

Even if Congress does not have the power to reject *Miranda*'s exclusionary rule, this Court should do so because the principles of *stare decisis* do not counsel in favor of retaining that rule. This Court's cases since *Miranda* have rejected its Fifth Amendment premises, and Congress has rejected its factual ones. In addition, *Miranda* runs afoul of this Court's teaching in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the federal government cannot impose prophylactic rules on States without showing congruence and proportionality between the injury and the remedy.

Law enforcement officers undoubtedly will continue their practice of giving the warnings as an efficient way of establishing voluntariness, but rejection of *Miranda*'s inflexible exclusionary rule will ensure that the criminal process will have the benefit of competent, reliable and constitutional evidence in the rare cases in which officers fail to comply with the technical requirements of *Miranda* doctrine.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT REQUIRE *MIRANDA*'S EXCLUSIONARY RULE

Petitioner and the Solicitor General spend the bulk of their respective briefs attempting to establish that—notwithstanding this Court's numerous statements to the contrary—*Miranda*'s exclusionary rule is somehow *required* by the Fifth Amendment, and that it therefore may not be modified by Congress or

the States unless this Court "overrules" *Miranda*. SG Br. 11-26; Pet. Br. 13-27. Neither the Solicitor General nor petitioner, however, explains how that contention can be squared with any coherent analysis of elementary principles of Fifth Amendment doctrine that this Court has consistently followed both before and after *Miranda*.

Those principles unmistakably show what this Court has, in any event, repeatedly conceded—*i.e.*, that *Miranda*'s exclusionary rule cannot plausibly be viewed as a remedy for any Fifth Amendment "compulsion." Indeed, both the Solicitor General and petitioner cloak their contentions in gauzy terminology—repeatedly asserting, for example, that *Miranda* is "constitutionally based" or that it has "constitutional weight"—that tellingly exposes their utter inability to identify, either in the plain terms of the Fifth Amendment or in conventional Fifth Amendment doctrine, a home for *Miranda*'s unyielding exclusionary rule. *E.g.*, SG Br. 23; Pet. Br. 22.

Because the Fifth Amendment plainly does not *require* that inflexible rule of exclusion for voluntary, though unwarned, custodial statements, Congress acted well within its proper sphere of authority in enacting 18 U.S.C. § 3501. There is therefore no need to "overrule" *Miranda* in order to sustain the constitutionality of the statute. Even were this Court to conclude otherwise, "the customary deference accorded the judgments of Congress," particularly where, "as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), and the inconsistency of *Miranda*'s rigid exclusionary rule with significant bodies of constitutional doctrine, should cause this Court to reconsider and reject that exclusionary rule.

A. This Court Has Rejected The Proposition That *Miranda* Is Required By The Fifth Amendment

1. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As is evident from its language, "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony," and therefore it "does not prohibit

every element which influences a criminal suspect to make incriminating admissions." *United States v. Washington*, 431 U.S. 181, 187-88 (1977); *see also Fisher v. United States*, 425 U.S. 391, 397 (1976) ("[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege"); *Hoffa v. United States*, 385 U.S. 293, 304 (1966) ("a necessary element of compulsory self-incrimination is some kind of compulsion"); *United States v. Monia*, 317 U.S. 424, 427 (1943) ("[t]he Amendment speaks of compulsion"). In particular, nothing in the Fifth Amendment "preclude[s] a witness from testifying voluntarily in matters which may incriminate him." *Monia*, 317 U.S. at 427.

At the outset, *Miranda* fits uneasily within that basic framework, because it effectively requires that unwarned custodial statements be "presumed compelled and * * * excluded from evidence at trial in the State's case in chief" (*Oregon v. Elstad*, 470 U.S. 298, 317 (1985)) even though the accused has never affirmatively claimed the privilege. Yet this Court has long held—both before and since *Miranda*—that a person who fails affirmatively to claim the protection of the Fifth Amendment is not "considered to have been 'compelled' within the meaning of the Amendment." *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (quoting *Monia*, 317 U.S. at 427); *Garner v. United States*, 424 U.S. 648, 654 (1976) ("if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself"); *United States ex rel. Vatjauer v. Commissioner of Immigration*, 273 U.S. 103, 112-13 (1927) (same). In other words, "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. * * * [I]f he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty from his decision to do so." *Murphy*, 465 U.S. at 429.

Murphy suggested that the "extraordinary safeguard[s]" that *Miranda* adopted are a "well-known exception" to conventional

Fifth Amendment doctrine. 465 U.S. at 429-30. The Court has, however, often articulated a far more plausible explanation for *Miranda*'s failure to meet the doctrinal requirements for "compulsion" that this Court repeatedly embraced both before and after *Miranda*—*i.e.*, that "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth v. Egan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring). As the Court has repeatedly stated, "[t]he prophylactic *Miranda* warnings * * * are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. at 444); *see also Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("*Miranda* * * * is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose"); *Elstad*, 470 U.S. at 310 ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced"); *Arizona v. Roberson*, 486 U.S. 675, 691 (1988) (Kennedy, J., dissenting) (*Miranda* "operates even absent constitutional violation").

Indeed, while *Miranda* itself suggested that the Court's analysis of compulsion (and its consequent adoption of an exclusionary rule) reflected the Court's interpretation of the Self-Incrimination Clause of the Fifth Amendment, this Court has been explicit in rejecting the precedent on which *Miranda* relied to suggest that the Clause is directed to the subject of custodial confessions. *Bram v. United States*, 168 U.S. 532 (1897), a case that *Miranda* described as "set[ting] down the Fifth Amendment standard for compulsion which we implement today" (*Miranda*, 384 U.S. at 461-62), long stood for the proposition that a statement must be deemed "compelled" if it was induced by any threat or promise or by the exertion of any improper influence "however slight." *Bram*, 168 U.S. at 542-43. That broad conception of "compulsion" best explains why *Miranda* was able to reason that pressures inherent in custodial interrogation may suffice to "compel" a confession. Yet this Court has expressly repudiated *Bram*, explaining that "under

current precedent" that case "does not state the standard for determining the voluntariness of a confession." *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991). It is, to say the least, anomalous for petitioner and the Solicitor General to proclaim the existence of a "constitutional basis" for *Miranda* without even discussing this Court's express rejection of the principal precedential basis that decision ever purported to have.

2. This Court not only has *said* that *Miranda*'s exclusionary rule is not an interpretation of, nor otherwise required by, the Fifth Amendment; this Court's cases have necessarily so *held*. *Miranda*'s exclusionary rule cannot be viewed as a remedy for any Fifth Amendment "compulsion," because, as demonstrated by this Court's immunity cases, true "compulsion" *must* be remedied by excluding all evidence derived directly or indirectly from the "compelled" statement. This Court, by contrast, has repeatedly held that such a remedy is not necessary for *Miranda* violations. Neither petitioner nor the Solicitor General attempts to reconcile those two lines of authority.

a. The quintessential example of true Fifth Amendment "compulsion" is a judicial order directing a citizen to answer on pain of punishment. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the first case in which this Court considered the constitutionality of immunity statutes, this Court made clear that such compulsion requires a broad suppression remedy. The immunity statute at issue in *Counselman* provided that no "evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him * * * in any court of the United States." *Id.* at 560. This Court construed that language as affording a witness protection only against use by the government of the specific testimony compelled from the witness under the grant of immunity, and thus as not "prevent[ing] the use of his testimony to search out" other evidence. *Id.* at 564. As so construed, the statute was found to violate the Fifth Amendment, because the prohibition on the government's use of the compelled testimony was not "a full substitute" for that amendment's prohibition. *Id.* at 585-86. In other words, the immunity provided by the statute in *Counselman* "was incomplete, in that it merely forbade the use

of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Ullmann v. United States*, 350 U.S. 422, 437 (1956).

By contrast, in *Kastigar v. United States*, 406 U.S. 441 (1972), the Court upheld the constitutionality of the current federal immunity statute, 18 U.S.C. § 6002. Unlike the statute considered in *Counselman*, Section 6002 provides immunity from the use of compelled testimony *and* from the use of any evidence derived "directly or indirectly" from such testimony. *Kastigar* reasoned that because Section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," the immunity it provides "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." 406 U.S. at 453.

Since its decision in *Kastigar*, the Court has repeatedly held that a witness who has been "compelled" to testify within the meaning of the Fifth Amendment *must* be accorded both "use" *and* "derivative use" immunity. *See, e.g., United States v. Balsys*, 524 U.S. 666, 692 (1998) (noting that the Fifth Amendment "requir[es] the Government to pay a price in the form of use (and derivative use) immunity"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254-55 (1983) (same). As the Court explained in holding that such compelled statements may not be used even to *impeach* a witness, true "compulsion" implicates the Fifth Amendment "in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

b. This Court's *Miranda* cases cannot be reconciled with the proposition that *Miranda* redresses any form of Fifth Amendment "compulsion." In *Harris v. New York*, 401 U.S. 222 (1971)—one of the Court's earliest *Miranda* cases—this Court held that unwarned custodial statements may be used to impeach the defendant if he takes the stand. Although *Miranda* itself had suggested that unwarned statements could not be so used, *see Miranda*, 384 U.S. at 477, this Court explained that

that suggestion "was not at all necessary to the Court's holding and cannot be regarded as controlling." *Harris*, 401 U.S. at 224. Reasoning that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," the Court refused to endorse a more sweeping exclusionary rule. *Id.* at 225-26. Thus, the *Miranda* doctrine expressly permits the use of unwarned custodial statements to impeach the defendant, and it does so on the basis of a balancing of interests that would be wholly impermissible if the Court were dealing with statements obtained in violation of the Fifth Amendment. *See Portash*, 440 U.S. at 459. That "balance was struck in *Harris*" and the Court has not been "disposed to change it." *Oregon v. Hass*, 420 U.S. 714, 723 (1975); *see also Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (reaffirming *Harris* rule).

Nor are the impeachment cases isolated examples of *Miranda*'s inconsistency with the rule that truly compelled statements may not be used for any purpose. In *Quarles*, *supra*, the Court adopted a "public safety" exception to *Miranda*, concluding that unwarned custodial statements and physical evidence derived from those statements need not be excluded—even from the prosecution's case-in-chief—if the interrogation that produced those statements was prompted by the officer's reasonable concern for public safety. *Quarles*, 467 U.S. at 654-57. The Court "conclude[d] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. That conclusion, the Court observed, is consistent with the traditional Fifth Amendment rule that neither compelled statements nor evidence derived from them may be used at trial, because *Miranda* did not hold that unwarned custodial statements are in fact "compelled" or "coerced." *Id.* at 655 & n.5. Instead, the *Miranda* Court held merely that warnings "would reduce the likelihood that * * * suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house." *Id.* at 656.

The Court reaffirmed that view of *Miranda* in *Elstad*, *supra*, where it again held that unwarned statements do not "taint" evidence subsequently derived from those statements, so as to make such derivative evidence inadmissible in the prosecution's case-in-chief. The Court emphasized that a "simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment," and that *Miranda* "itself recognized this point when it disclaimed any intent to create a 'constitutional straitjacket' and invited Congress and the States to suggest 'potential alternatives for protecting the privilege.'" *Elstad*, 470 U.S. at 306-07 & n.1.

In sum, *Harris*, *Quarles* and *Elstad* necessarily establish that *Miranda*'s inflexible exclusionary rule is *not* required by the Fifth Amendment. Although the Self-Incrimination Clause *does* require a rigid exclusionary rule for truly compelled statements, the Court's willingness to modify the *Miranda* rule on the basis of considerations of policy, as evidenced by its rulings on impeachment and derivative evidence, belies any argument that *Miranda* is the rule that the Constitution requires.[5] In other words, despite this Court's view that unwarned statements must be "presumed * * * compelled" (*Elstad*, 470 U.S. at 317), the departure in *Harris*, *Quarles* and *Elstad* from the *Counselman-Kastigar* rule demonstrates that the "presumption" does not reflect any conclusion that such unwarned statements are *in fact* "compelled" within the meaning of the Fifth Amendment.[6]

---

[5] Indeed, Congress's decision to provide a remedy for compelled statements that mirrored the results obtained under *Harris*, *Quarles* and *Elstad* was the reason this Court struck down the immunity statute at issue in *Counselman*. Neither petitioner nor the Solicitor General has explained how, if *Miranda*'s exclusionary rule is indeed required to remedy some form of Fifth Amendment "compulsion," this Court could lawfully assert (by ruling as it did in *Harris*, *Quarles* and *Elstad*) for itself the authority that it has long denied to Congress.

[6] The view that *Miranda* does not remedy any Fifth Amendment "compulsion" also follows, of course, from the Court's traditional rule that no such compulsion occurs unless the witness affirmatively claims the protection of the privilege. *Monia*, 317 U.S. at 427.

Where there is no constitutional violation, Congress must be free to craft an alternative framework for the admissibility of those statements.

B. This Court's Substantive Due Process Decisions Are Inconsistent With The Proposition That *Miranda* Defined The Fifth Amendment

The fact that unwarned custodial statements are simply not "compelled" within the meaning of the Fifth Amendment also explains another aspect of this Court's jurisprudence of confessions that both petitioner and the Solicitor General ignore: this Court's insistence that a defendant who receives warnings in accordance with *Miranda* may nonetheless seek to suppress his statements on the ground that those statements were "involuntary" under *due process* standards. *See Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (suppressing statements on that theory); *see also Elstad*, 470 U.S. at 307-08 ("Where an unwarned statement is preserved for use in situations that fall outside the sweep of * * * *Miranda* * * *, the primary criterion of admissibility remains the 'old' due process voluntariness test") (internal brackets, quotation marks and citation omitted).

1. The Court's retention of *due process* "voluntariness" as a claim that a defendant may make *in addition* to any claim he may have under *Miranda* and its progeny strongly supports the view that unwarned custodial statements do not, as a general matter, violate any provision of the Fifth Amendment. That is because the Court has made clear that due process is a *residual* doctrine that may be invoked *only* when no specific provision of the Bill of Rights addresses the alleged deprivation at hand. *See, e.g., Graham v. Connor*, 490 U.S. 386, 395 (1989).

As the Chief Justice has noted, because the Framers of our Constitution sought to restrict arbitrary or oppressive government action primarily through the Bill of Rights, only the specific Amendment that addresses a "particular sort of government behavior," rather than substantive due process principles, should be applied to claims challenging that particular behavior. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J., joined by O'Connor, Scalia, &

Ginsburg, JJ.); *see also id.* at 281 (Kennedy, J., joined by Thomas, J., concurring in judgment) ("I agree with the plurality that [the] allegation * * * must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). Thus, under settled doctrine, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)).

2. The Court's continued reliance on substantive due process principles in assessing the voluntariness of custodial confessions necessarily means that such confessions are not "covered by" the Self-Incrimination Clause of the Fifth Amendment—presumably because the Court continues to adhere to the conventional understanding of "compulsion" reflected in *Monia* and similar cases. Indeed, that reliance on substantive due process would be inexplicable if—as petitioner and the Solicitor General appear to believe—unwarned custodial statements violate some undefined component of the Self-Incrimination Clause of the Fifth Amendment.

C. That This Court Has Ruled On *Miranda* Issues In State Cases Does Not Establish That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule

The parties contend, however, that this Court's application of *Miranda* to the States, and its conclusion that *Miranda* claims may be raised in habeas corpus proceedings, *Withrow v. Williams*, 507 U.S. 680 (1993), conclusively show that *Miranda* is a rule of federal constitutional law that Congress is powerless to modify. *See* Pet. Br. 27; *see also* SG Br. 23-25. That argument is unavailing.

1. To begin with, while this Court has decided *Miranda* issues in cases arising out of State courts, this Court has never clearly defined the basis for, or the contours of, its authority to apply *Miranda*'s exclusionary rule to the States, and it certainly has not examined those questions in the wake of *Harris*,

Quarles and *Elstad*. Those State cases therefore have no precedential value on those antecedent questions, since, as the Court has frequently stated, "questions which merely lurk in the record are not resolved, and no resolution of them may be inferred." *United States v. Shabani*, 513 U.S. 10, 16 (1994) (internal quotation marks omitted); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Webster v. Fall*, 266 U.S. 507, 511 (1925). Indeed, even if those State cases were viewed as speaking to whether *Miranda*'s exclusionary rule in fact remedies any Fifth Amendment violation, that would *at most* establish that they are inconsistent with *Harris*, *Quarles* and *Elstad*, which—unless this Court is to overrule *Counselman* and *Kastigar*—necessarily stand for the contrary proposition. Yet neither petitioner nor the Solicitor General offers a persuasive reason for simply picking one line of authority and ignoring the other.

2. In any event, the argument advanced by petitioner and the Solicitor General proceeds from an erroneous premise. Although it is true that this Court lacks authority to impose "supervisory" rules (*i.e.*, rules dictated solely by this Court's sense of desirable practice) on the State courts, it by no means follows that any rule that this Court bases on the Constitution, or that it decides to apply to the States, may never be overridden legislatively. In fact, this Court's cases are to the contrary.

To cite only the most obvious example, the Court has recognized private rights of action—based on the Constitution itself—for damages caused by violations of the Fourth, Fifth and Eighth Amendments, while consistently recognizing that Congress retains authority to "provide[] an alternative remedy which it explicitly declare[s] to be a substitute for recovery directly under the Constitution." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis omitted) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (Due Process Clause of the Fifth Amendment; "in the absence of affirmative action by Congress"); *Bivens*, 403 U.S. at 397 (Fourth Amendment; noting absence of an "explicit congressional declaration that persons injured * * * must instead be remitted to another remedy, equally effective in the view of Congress"). The rule could

hardly be otherwise, because—even with respect to *actual* violations of the Constitution—Congress has undoubted authority to direct courts to employ one constitutionally adequate remedy rather than another. *See* U.S. CONST. amend. XIV, § 5. It would be strange indeed if Congress possessed no similar authority with respect to "prophylactic" rules intended merely to guard against the *risk* of a constitutional deprivation.

D. *Miranda* Itself Invited Congress And The States To Develop Their Own Approaches To The Admissibility Of Custodial Confessions

The parties' contention that Congress lacks authority to modify *Miranda*'s exclusionary rule rings especially hollow in light of this Court's invitation to Congress and the States, in *Miranda* itself, to frame their own approaches to the admissibility of confessions. *Miranda*, 384 U.S. at 467. The parties contend, however, that this Court's invitation permits only those alternative approaches that, like *Miranda*, expressly apprise a defendant of his rights. *E.g.*, SG Br. 27. Although certain language in *Miranda* does support that proposition, this Court should reject the parties' argument.

1. There is no basis in this Court's cases for the parties' attempt to parse through the *Miranda* opinion as though it were a statute. *Cf. Duckworth v. Egan*, 492 U.S. at 203 ("courts * * * need not examine *Miranda* warnings as if construing a will or defining the terms of an easement"). That approach is especially inadvisable given that the parties' reading of *Miranda* would transform that opinion into the very "constitutional straitjacket" that the Court was at pains to disclaim (384 U.S. at 467), and would effectively nullify any alternative approach to the admissibility of confessions that does not take the *Miranda* framework as an unchangeable "floor." The result could stifle alternative frameworks—or new technologies—that may well be more efficacious than *Miranda* in assuring the voluntariness of confessions.

Far from being required by precedent, that inflexible approach to prophylactic rules was recently rejected by the Court in *Smith v. Robbins*, 120 S. Ct. 746, 756-59 (2000). *Robbins*,

like this case, involved a claim that earlier opinions of this Court required States to use a particular "prophylactic framework" to vindicate a defendant's constitutional rights—in that case, the constitutional right to appellate counsel. Although the Court conceded that the claim was not without some support in its cases, it rejected the claim because it "contraven[ed] [the Court's] established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Id.* at 757.

In fact, *Robbins* completely devastates the parties' claim that this Court's application of a prophylactic rule to cases coming from the State courts necessarily establishes that such a rule is impervious to change save by this Court. The rule at issue in *Robbins*—which governed appeals by convicted indigents, *see Anders v. California*, 386 U.S. 738 (1967)—had, like *Miranda*, been described by this Court as a "prophylactic framework" and "not 'an independent constitutional command.'" *Robbins*, 120 S. Ct. at 757. And, like *Miranda*, it had been announced by this Court in a State case; indeed, this Court had applied it *only* in State cases. Nonetheless, this Court concluded that the California courts had the authority to modify those procedures, so long as the alternative procedures "focus[ed] on the underlying goals that the procedure should serve," thus assuring compliance with the relevant constitutional norm. *Id.* at 760.

2. The parties cannot reasonably dispute that Section 3501 meets those requirements. The statute requires that *two* fact-finders—the trial judge and the jury—be persuaded that the defendant's confession meets the constitutional standard of voluntariness.[7] Although no single factor conclusively controls the

[7] In 1986, nearly twenty years after the passage of 18 U.S.C. § 3501, this Court for the first time squarely held that due process and the Sixth Amendment require that a defendant be permitted to reargue the voluntariness of his confession to the jury. In reaching that conclusion, the Court relied in part on Section 3501(a) and similar state statutes as evidence of a broad consensus within the federal system that such a procedure is needed to assure a fair trial. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

question of voluntariness, and courts are free to consider other factors, Congress's inclusion of five specific factors that trial courts *must* consider in assessing that question—including any delay in presentment and whether the defendant received *Miranda* warnings—ensures that courts will remain alert to the factors that this Court has found most likely to assure that custodial statements will in fact be voluntary.

Indeed, while reviving the traditional "totality of the circumstances" approach to admissibility, Section 3501 emphasizes protections that are required neither by the *Miranda* framework nor by the Constitution. Thus, the trial judge must consider whether the "defendant knew the nature of the offense" of which he was suspected (18 U.S.C. § 3501(b)(2)), even though such knowledge is not required to ensure a valid waiver of *Miranda* rights under this Court's cases. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987). Section 3501(b)(1) goes even further by requiring express consideration of delay in presentment, thus retaining some elements of the non-constitutional *McNabb-Mallory* rule. In that manner, Congress assured that police officers will know that protracted custodial interrogation, without judicial intervention (through which the suspect will certainly be told of his rights, *see* FED. R. CRIM. P. 5), places the admissibility of any ensuing confession at risk. *Compare Brown v. Allen*, 344 U.S. 443, 476 (1953) (under traditional voluntariness precedent, "[m]ere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained"), *with* 18 U.S.C. § 3501(c) (confession may be found inadmissible "solely because of delay" in presenting the accused to a magistrate if delay exceeds six hours). And, as the Fourth Circuit noted, law enforcement officers retain, under the statute, a strong incentive to "giv[e] the now familiar *Miranda* warnings." J.A. 210. Those procedures are plainly sufficient to meet the requirements of the Constitution.

E. If This Court Concludes That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule, The Court Should Do So Itself

Even if petitioner and the Solicitor General are correct in asserting that Congress lacks constitutional authority to modify *Miranda*'s rigid exclusionary rule, this Court should do so to the extent necessary to sustain the constitutionality of Section 3501.

1. "*Stare decisis* is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but merely reflects a policy preference for stability in the law. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). That preference is "reduced * * * in the case of a procedural rule" such as *Miranda*, "which does not serve as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995), and "cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Ibid.*; *Agostini*, 521 U.S. at 235-36.

Those principles dictate abandonment of *Miranda*'s inflexible exclusionary rule. Indeed, petitioner's contrary arguments are largely misdirected. The *stare decisis* issue in this case—if there is one—is not whether *Miranda* should be repudiated wholesale, but whether *Miranda*'s exclusionary rule should be retained. No one contends that law enforcement officers should be *precluded* from giving the *Miranda* warnings. If it is indeed true that law enforcement officers find it easy and advantageous to administer *Miranda* warnings because they virtually assure the admission of a confession (SG Br. 33-38), then self-interest alone will suffice to ensure that officers will continue to use such warnings and that the flood of litigation feared by the Solicitor General (*id.* at 37) will fail to materialize.[8] Similarly, it

[8] *Miranda*'s exclusionary rule serves, if anything, to increase the number of issues over which parties can litigate. The *Miranda* doctrine requires a trial judge to determine (1) whether the arresting officers complied with *Miranda* and its complex progeny, including rules governing how police must react to a suspect's invocation of rights, *see, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990); (2) whether the suspect "voluntarily" waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369, 373 (1979); and (3) whether the suspect's statements are "voluntary" under due process standards. Courts almost invariably will be called upon to make several of these determinations. If the court finds that the officer violated *Miranda*, it will be required to address (as the district court did in this case) the issue of voluntariness in order to assess whether the defendant's statements can be used for impeachment and whether the government is entitled to introduce evidence derived from those statements. If the officer complied with *Miranda*, the court must still address whether the defendant voluntarily waived his rights, and whether the statements are voluntary under due process standards.

is difficult to see what valid "[r]eliance" interests in *Miranda*'s exclusionary rule conceivably could be claimed by a defendant who has suffered no actual constitutional harm—much less by society at large (SG Br. 38), whose "legitimate and compelling" interest is that the guilty be brought to justice. *Schall v. Martin*, 467 U.S. 253, 264 (1984).

Moreover, neither petitioner nor the Solicitor General comes to grips with the significant factual and legal developments that have occurred since this Court decided *Miranda*. Neither attempts to reconcile *Miranda* and its progeny with the larger body of this Court's Fifth Amendment doctrine, particularly *Counselman* and *Kastigar*; instead, both parties treat this Court's decisions in *Harris*, *Quarles* and *Elstad* as more or less *sui generis*. Nor do the parties address this Court's repudiation of *Bram*'s standard of compulsion (*Fulminante*, 499 U.S. at 285), even though the *Miranda* Court expressly based its decision on that standard. *Miranda*, 384 U.S. at 461. And although "Congress is a coequal branch of government whose Members take the same oath * * * to uphold the Constitution" as this Court does, and whose judgment is entitled to "great weight," *Rostker*, 453 U.S. at 64, neither petitioner nor the Solicitor General gives *any* weight to the fact that Congress, after conducting extensive hearings, not only rejected the "legislative facts" that underlay *Miranda*'s conclusions but also concluded that

Miranda inflicts unjustified harm on legitimate law enforcement practices. Those detailed conclusions, which are consistent with the experience of Maricopa County prosecutors and which are supported by contemporary scholarship, *see* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998), deserve a more respectful treatment from this Court than the Executive Branch is willing to accord them. Indeed, petitioner and the Solicitor General dismiss even the vast change in public awareness of a defendant's rights vis-à-vis the criminal justice system that has occurred since *Miranda*—a change that recently prompted this Court to observe that, "[i]n the modern age of frequently dramatized 'Miranda' warnings," it is "implausible" to suggest that a "person may be unaware of his right to remain silent." *Brogan v. United States*, 522 U.S. 398, 405 (1998).

2. Those considerations do not lose their force simply because the parties assert that this Court must have some authority to adopt "prophylactic" rules. *E.g.*, SG Br. 43-47. As this Court recognized in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Constitution itself imposes limits on the federal government's ability to frame "prophylactic" rules, especially when those rules are made binding on the States. In particular, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 508.[9] *Miranda*'s exclusionary rule cannot meet that test and should not be reaffirmed for that additional reason. In-

[9] *City of Boerne* framed that test in order to determine whether Congress permissibly invoked its power under Section 5 of the Fourteenth Amendment. A judicially devised "prophylactic" measure must comply with *City of Boerne* because Congress's authority is, if anything, broader than this Court's implied power to devise remedies for constitutional violations. *Compare Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (upholding congressional ban on literacy test under Section 5), *with Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (refusing to strike down literacy requirement under Court's own authority to enforce the Constitution).

deed, had Congress enacted *Miranda*'s requirements itself, it is inconceivable that—after *City of Boerne*—such a statute would be upheld by this Court.

The constitutional harm that *Miranda* is designed to prevent is the risk that suspects in custody will be "compelled" to make self-incriminating statements, which will then be used at trial in violation of the Fifth Amendment. Yet the record on which *Miranda* relied for supposing that this was a pervasive problem is significantly weaker than the legislative records that the Court found inadequate to establish the pervasiveness of the underlying harm in *City of Boerne* and in every subsequent case that has considered "prophylactic" legislation. *See City of Boerne*, 521 U.S. at 531 ("anecdotal evidence" that did not reveal a "widespread pattern of religious discrimination in this country"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999) ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 649 (2000) ("it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States").

In fact, the Court conceded in *Miranda* that examples of brutality "were undoubtedly the exception" even thirty-four years ago, *Miranda*, 384 U.S. at 447, and based its conclusion primarily on "police manuals and texts" that, in its view, suggested widespread use of interrogation techniques *capable* of overbearing a suspect's free will. *Id.* at 448. As Justice White noted in dissent, however, "even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly [did] not follow that each and every case will disclose * * * this type of consequence." *Id.* at 533 (White, J., dissenting). The Court, for its part, did not contend otherwise, but was satisfied to treat the "potentiality for compulsion" (*id.* at 457) itself as the pervasive evil that justified the creation of a prophylactic rule. Because the Court failed to demonstrate that this "potentiality" was realized frequently enough to make *compulsion* pervasive, however, the *Miranda* "prophylactic" regime is essentially indistinguishable from the statutory regime this

Court struck down in *City of Boerne*. *See* 521 U.S. at 531; *cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time").

In sum, given *Miranda*'s "infirmities, and its increasingly wobbly, moth-eaten foundations," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (brackets omitted), no justification remains for retaining *Miranda*'s inflexible exclusionary rule, particularly in the teeth of an Act of Congress that fully safeguards the underlying constitutional right while preserving society's compelling interest in the detection and prosecution of crime. If this Court should conclude that Congress lacks sufficient authority to modify that inflexible rule, this Court should itself reject that rule and sustain Congress's judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD M. ROMLEY
Maricopa County Attorney
PAUL AHLER
Chief Deputy
MARICOPA COUNTY
ATTORNEY'S OFFICE
301 W. Jefferson Street
Phoenix, Arizona 85003
(602) 506-3800

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
MIGUEL A. ESTRADA
CURTIS E. GANNON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

March 9, 2000

AMICUS CURIAE

BRIEF

Mar 9 2000

No. 99-5525

Supreme Court, U.S.
FILED
MAR 0 9 2000
CLERK

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, VARIOUS STATE PROSECUTING ASSOCIATIONS, AND THE POLICE EXECUTIVE RESEARCH FORUM IN SUPPORT OF THE JUDGMENT BELOW

HONORABLE STUART VANMEVEREN
District Attorney, 8th Judicial District, Colorado
President, National District Attorneys Association
99 Canal Center Plaza
Suite 500
Alexandria, VA 22314

JEFFREY C. SULLIVAN
Prosecuting Attorney
LAURI BOYD
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney's Office
128 N. 2d Street, Room 211
Yakima, WA 98901

ROBERT OLSON
Chief, Minneapolis Police
President, Police Executive Research Forum
CHUCK WEXLER
Executive Director
1120 Connecticut Avenue
Suite 930
Washington, D.C. 20036

LYNNE ABRAHAM
District Attorney
RONALD EISENBERG*
Deputy District Attorney
Philadelphia District Attorneys Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700
*(*Counsel of Record*)

(Additional Organizations Listed In Appendix Attached Hereto)

BEST AVAILABLE COPY

30pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

THE *MIRANDA* RULE OF AUTOMATIC SUPPRESSION – AS DISTINCT FROM THE GIVING OF WARNINGS IN THEMSELVES – DISSERVES THE VICTIMS OF CRIME AND FRUSTRATES THE EFFORTS OF POLICE AND PROSECUTORS TO SECURE PROPER, PROBATIVE STATEMENTS FROM CRIMINAL SUSPECTS 5

CONCLUSION 22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999) 13

Feltrop v. Delo, 46 F.3d 766 (8th Cir. 1995) 17

Green v. Scully, 850 F.2d 894 (2d Cir. 1988) 16

Guam v. Muna, 999 F.2d 397 (9th Cir. 1993) 18

Hawkins v. Lynaugh, 844 F.2d 1132 (5th Cir. 1988) 16

Holland v. McGinnis, 963 F.2d 1044 (7th Cir. 1992) 17

Lucero v. Kerby, 133 F.3d 1299 (10th Cir. 1998) 18

McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988) 17

McCoy v. Newsome, 935 F.2d 1252 (11th Cir. 1992) 18

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988) 18

Smith v. Robbins, 120 S. Ct. 746 (2000) 15

Sumpter v. Nix, 863 F.2d 563 (8th Cir. 1988) 18

United States v. Cisneros-Cruz, 1999 U.S. App. LEXIS 14899 (10th Cir. 1999) 18

United States v. Gatewood, 184 F.3d 550 (6th Cir. 1999) 17

United States v. Kelley, 953 F.2d 562 (9th Cir. 1992) 18

United States v. Mahan, 190 F.3d 416 (6th Cir. 1999) 17

United States v. Mendoza, 85 F.3d 1347 (8th Cir. 1996) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991) 17

United States v. Starks, 1997 U.S. App. LEXIS 12016 (6th Cir. 1997) 17

STATE CASES

Commonwealth v. Edwards, 651 N.E.2d 398 (Mass. 1995) 21

Commonwealth v. St. Peter, 722 N.E.2d 1002 (Mass. App. 1999) 21

Light v. State, 547 N.E.2d 1073 (Ind. 1989) 20

Noble v. State, 892 S.W.2d 477 (Ark. 1995) 19

People v. Gennings, 808 P.2d 839 (Colo. 1991) 19

People v. Hardaway, 718 N.E.2d 682 (Ill. App. 1999) 20

People v. Hutton, 831 P.2d 486 (Colo. 1992) 19

People v. Jones, 949 P.2d 890 (Cal. 1998) 19

People v. Sexton, 580 N.W.2d 404 (Mich. 1998) 21

State v. Casiano, 740 A.2d 435 (Conn. App. 1999) 20

State v. Collins, 446 P.2d 325 (Wash. 1968) 21

State v. Gella, 988 P.2d 200 (Hawaii 1999) 20

State v. Jones, 984 P.2d 132 (Kan. 1999) 20

State v. LaPointe, 678 A.2d 942 (Conn. 1996) 19

State v. Pettit, 979 P.2d 5 (Ariz. App. 1998) 19

State v. Pinder, 736 A.2d 857 (Conn. 1999) 19

TABLE OF AUTHORITIES – Continued

Page

State v. Reid, 394 N.W.2d 399 (Iowa 1986) 20

State v. Wilms, 449 So. 2d 442 (La. 1984) 20

Stevens v. State, 941 S.W.2d 411 (Ark. 1997)..... 19

Williams v. State, 732 A.2d 376 (Md. App. 1999) 21

FEDERAL RULE

Supreme Court Rule 37 1

INTEREST OF THE *AMICI CURIAE*[1]

The National District Attorneys Association is the sole organization representing local prosecuting attorneys across the United States. Since its founding in 1950, the Association's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all citizens. NDAA members are responsible for the vast majority of criminal prosecutions in this country. They are concerned that the suppression of voluntary statements – in the name of a rule that is supposed to protect against involuntary statements – is detrimental to the victims of crime, the efforts of law enforcement to solve and prosecute crime, and the fundamental principles of the criminal justice system. The NDAA is joined on this brief by numerous state associations, representing the attorneys responsible for prosecuting most of the criminal violations in the United States.

The Police Executive Research Forum (PERF) is a national association of progressive law enforcement professionals who are dedicated to advancing innovative policing practices through research, leadership and debate. PERF's police executive members serve more than 50 percent of the nation's population. The association is a non-profit organization based in Washington, D.C. that

---

[1] This *amici curiae* brief is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside of the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. *See* Supreme Court Rule 37.

also includes categories of membership for individuals who are criminal justice practitioners, academicians and others interested in improving how police serve their communities.

SUMMARY OF ARGUMENT

The briefs in support of petitioner, including the Solicitor General's, devote considerable energy to the argument that law enforcement likes *Miranda* suppression, that police and prosecutors want a world where the only permissible way to achieve voluntary confessions is through the giving of formulaic warnings, deviation from which requires suppression.

That is simply untrue, as demonstrated by the many *amicus curiae* briefs filed in support of the decision below. These filings represent an unusually broad and deep consensus, among both police and prosecutors, that the criminal justice system should work from the ground up to develop appropriate practices for ensuring voluntary statements, rather than from the top down to impose a single way.[2]

[2] An *amicus* brief has already been filed by Americans for Effective Law Enforcement, joined by the International Association of Chiefs of Police and the National Sheriffs Association. Although nominally "in support of neither party," that brief fully supports the Fourth Circuit's decision.

In addition to this brief on behalf of NDAA and PERF, other prominent law enforcement organizations filing *amicus* briefs in support of the decision below include the Fraternal Order of Police, the National Association of Police Organizations (NAPO), the FBI Agents Association, and the Federal Law Enforcement Officers Association (which will be joining the NAPO brief).

Still more organizations, while not all filing *amicus* briefs, have stated their clear support for the positions taken here. Letter of The Law Enforcement Steering Committee, January 20, 2000, on behalf of Federal Law Enforcement Officers Association, Fraternal Order of Police, International Brotherhood of Police Officers, Major Cities Chiefs, National Association of Police Organizations, National Troopers Coalition, and Police Executive Research Forum ("We are not suggesting that *Miranda* warnings be eliminated, only that those warnings be part of a voluntariness test that will ensure that victims are not re-victimized and that we can join with prosecutors to stop repeat and serious offenders. For true fairness, the criminal justice system should address the significant number of cases in which criminals who voluntarily confess are released or the case is never brought to trial because of a technical violation in issuing *Miranda* warnings. Section 3501 properly resolves those issues").

The imposition resides not in the notion of warnings per se, but in the penalty of suppression for any violation of the warnings edict, even where it is perfectly clear that the statement is nonetheless voluntary. No matter what the outcome of this case, some variety of warnings will continue to play a valuable role in police interrogation practices. But the suppression of even concededly voluntary statements, because of the violation of a rule that exists for the sole purpose of guaranteeing voluntary statements, is the height of costly hypertechnicality.

And that cost is considerable, in the judgment of the law enforcement professionals who are charged with vindicating the concerns of victims and implementing the criminal statutes. There is much academic debate about

the degree to which warnings may discourage statements. But there can be no debate that, when a criminal is let free because his voluntary confession was not preceded by full warnings, the victim is wounded and society is harmed. The perception that these are a relatively small portion of cases is small comfort. The release of a rapist or murderer endangers the community. It simply cannot be justified on the ground that his statement was actually voluntary yet constructively involuntary.

While such a paradoxical rule reigns, true innovation is stymied. New techniques such as videotaping, not contemplated at the time of *Miranda*, are slow to spread, in part because they cannot solve the *Miranda* quandary: no matter how good police and prosecutors become at ensuring and proving the voluntariness of statements they take, their efforts are legally irrelevant in the face of a single mistake in applying the warnings requirement. The voluntary statement must still be suppressed.

Petitioner's supporters argue, in effect, that no innovation is necessary, because mandated warnings are the pinnacle of development, properly enshrined for all time, providing an easy checklist for police and courts that virtually eliminates messy litigation about voluntariness. But case law shows otherwise. The reporters are replete with cases in which defendants choose to challenge voluntariness aside from warnings, prosecutors are forced to defend, and courts are required to adjudicate. These non-*Miranda* claims infrequently succeed – not because warnings were administered, however, but because the assertions that police used physical or mental force fail on credibility grounds, or do not constitute coercion as a matter of law.

The *Miranda* exclusionary rule does not ensure voluntariness; it is distinct from voluntariness. It denigrates victims and jeopardizes the public even in situations where its ostensible concern – voluntariness – is not in question. It is imposed on police and prosecutors to the exclusion of other beneficial interrogation practices. It rewards confessed criminals with a windfall that undermines every objective of the criminal justice process. Contrary to the representations made to this Court, the majority of the law enforcement community does not welcome suppression of voluntary confessions.

ARGUMENT

THE *MIRANDA* RULE OF AUTOMATIC SUPPRESSION – AS DISTINCT FROM THE GIVING OF WARNINGS IN THEMSELVES – DISSERVES THE VICTIMS OF CRIME AND FRUSTRATES THE EFFORTS OF POLICE AND PROSECUTORS TO SECURE PROPER, PROBATIVE STATEMENTS FROM CRIMINAL SUSPECTS.

Since this case arose, the mantra of *Miranda* defenders has been that we have learned to live with the decision. The public knows the warnings, we are told; police have become used to reciting them; prosecutors are happy to present them into evidence.

And all that might be important, if the question were one of policy for police agencies seeking to determine whether to include warnings as part of their interrogation procedures. We believe that warnings are generally advisable when questioning criminal suspects, and should be

embodied in police practices regardless of the result in this case.

But of course that is not the question. The issue instead is whether this Court, by invoking precious constitutional authority, should compel all law enforcement officers in the United States to address the issue of voluntariness in exactly one and the same way: by reciting a specific set of warnings, dictated by this Court, on pain of suppression of any resulting statement – even where the evidence shows, or indeed where a court has found, that the confession was entirely voluntary.

Other briefs will address whether the Court truly has the constitutional power to craft such a mandate. This brief discusses the claim that law enforcement would welcome that result.

On the basis of their professional experience, the majority of law enforcement members reject the idea that the costs are nil and the benefits great when courts suppress voluntary confessions. Suppression has a dramatic impact on the victims of these crimes, and endangers other citizens. The rule of suppression, moreover, is a powerful deterrent to the development and adoption of new techniques to ensure voluntariness outside the strict confines of *Miranda*. Yet the claimed payoff is illusory: the warnings requirement does not simplify voluntariness challenges to statements; it simply adds another, independent layer of litigation, and provides the criminal defendant with a second shot at excluding probative evidence.

In analyzing the impact of *Miranda* suppression, the starting point must be with the victims and potential victims of crime. The criminal justice system was not created as a giant civics lesson to teach the public about the rights of suspects; its primary function is to protect the weak from the strong by administering a perceived disincentive to the use of illicit force. When a self-acknowledged assailant escapes proper punishment because his voluntary confession is excluded, the impact is not theoretical, not prophylactic.

These are some of the cases that represent the face of *Miranda* suppression:

George Harpster

The defendant was extradited from another state for the rape of a twelve-year-old girl. He was not warned upon arrival, because the receiving officer believed that the suspect had been given his rights during transit. The defendant began complaining about the victim, stating that she got what she deserved from him, but that the police would not be able to use this admission against him, because he had never been read his rights.

As the defendant had anticipated, the court suppressed his confession, ruling that warnings should have been given before the defendant began speaking. Because of the reduced evidence against him, the defendant was allowed to plead guilty to the lesser charge of child molestation, and was soon paroled. He has since violated

parole for failure to comply fully with conditions concerning contact with adolescent girls.[3]

Carlos Sampson

The defendant reported to police that his daughter had been kidnapped. When questioned, he admitted that he had killed the child following a custody dispute, and led police to the victim's body.

The court suppressed the statement, ruling that under the totality of the circumstances the defendant was in custody when he confessed, and that he had at least equivocally invoked his right to counsel. The court held that, although the defendant was "clearly guilty," suppression was constitutionally required under *Miranda*, and the physical evidence recovered from discovery of the body was the product of the constitutional violation. The prosecution was thereafter withdrawn.[4]

Thomas Bennett

The defendant and his cohorts forced their way into the victim's house, where they shot him to death and took his wallet. The defendant was informed that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to an attorney. Because *Miranda* had not yet been decided at the time, however, the defendant was not told that, if he could not afford one himself, an attorney would be

---

[3] *State v. Harpster*, Information No. 97-1-00026-8, Jefferson County, Washington.

[4] *State v. Sampson*, Case No. 890327, Salt Lake County, Utah.

appointed for him. The defendant confessed and was convicted of murder in the first degree.

On appeal, the court held that *Miranda* had been violated, and reversed the conviction. On retrial, without the defendant's confession, he was acquitted.[5]

Ruple Smith

The defendant abducted and raped a fourteen-year-old girl. After the crime he called police because of his similarity to a composite sketch circulated in the community. He was questioned in a patrol car outside his residence and eventually acknowledged his conduct.

The court suppressed the statement, ruling that the course of the questioning reasonably led the defendant to believe at some point that he was not free to leave the patrol car, and that warnings therefore should have been administered. The case is pending on appeal.[6]

Erika Arroya

The defendant called police to report that her three-year-old son had drowned in the bathtub. She was given *Miranda* warnings and questioned. At one point, when she became upset, the detective asked her if she wanted to take a break. The defendant said she would like to stop talking. After the break, questioning resumed and the defendant admitted that she had killed the child. The entire interrogation was recorded on videotape.

---

[5] *Commonwealth v. Bennett*, No. 928 July Term 1968, Philadelphia County, Pennsylvania.

[6] *State v. Smith*, Trial Court No. 3KN-94-1024 CR, Kenai Peninsula Borough, Alaska.

The court granted suppression. The court found that the interviewing detective had maintained a "gentle" tone throughout the questioning, and had been "repeatedly solicitous" of the defendant's condition. Nonetheless, held the court, the defendant's statement that she wanted to stop required the cessation of all further interrogation, whether or not she was actually willing to resume after the break. As a result of the suppression, the murder charge was dropped and the defendant pleaded guilty to a lesser offense.[7]

Robert Power

The defendant participated in the robbery/murder of a ninety-five-year-old man, who was shot three times during the crime. When contacted by police, he agreed to give them a statement. He was transported to the station and all questioning was tape recorded and transcribed.

The court suppressed the incriminating statement, ruling that the defendant was in custody at the time and that his reference to an attorney should have halted the questioning. The court specifically rejected the defendant's coercion claim, finding that the confession was voluntary. But because of the *Miranda* suppression, the charges were reduced from first degree murder, and the defendant was allowed to plead guilty to manslaughter.[8]

Suppression supporters dismiss such cases as merely "anecdotal." That is a truism. It is impossible to systematically quantify the circumstances and consequences of

---

[7] *State v. Arroya*, No. 99SA153, Denver County, Colorado.

[8] *State v. Power*, Information No. 96-1-01668-8, Snohomish County, Washington.

Miranda suppression rulings. Most such cases never go to trial, and therefore never appear in case reporters. And when the benefiting criminal goes on to perpetrate new offenses, his *Miranda* history will generally be unknown.

Based on our experience in law enforcement, however, we can identify certain characteristics among cases in which voluntary statements are excluded for warnings violations.

We know that suppression is not merely a relic of the "old days," when officers were just learning the *Miranda* mandate. Certainly many convictions were lost in the late 60's and 70's because of the ex post facto application of *Miranda* to interrogations occurring before the case was decided. But statements are still regularly thrown out, because *Miranda* is not really a bright-line rule: it encompasses inherently ambiguous issues such as "custody" and "interrogation" and "equivocal" assertion of rights, issues that must be examined under the totality of circumstances.

We know that suppression of voluntary confessions has a disproportionate impact in more serious cases, such as child abuse and murder, in which there is frequently no available witness other than the perpetrator himself. In contrast is the Fourth Amendment exclusionary rule, which disproportionately affects cases turning primarily on physical evidence, such as drug and gun possession.

We know that, when confessions are excluded, the result is almost always a discharge or significant reduction of charges, and that admitted criminals are therefore free much earlier to commit more crime.

And we know that, when a defendant's freely given admissions are thrown out, the victim feels victimized again. Suppression of voluntary confessions is an unusual area of certainty in a frequently unsure system. In such cases, the defendant knows he perpetrated the offense; the court knows he knows; and the victim is left understandably wondering who stands for her. Such an experience will hardly build confidence in our criminal justice institutions.

But even beyond the trauma to present and future victims of crime, the *Miranda* exclusionary rule undermines its own goal of ensuring against coercion while securing probative evidence. The policy frozen into law by *Miranda* is that there is only one method for taking voluntary statements from criminal suspects. Allowed to innovate, however, without the threat of *Miranda* suppression hanging overhead, police professionals can develop alternative, and better, ways to protect defendants' rights while solving their crimes.

Exhibit A in this day is videotaping. Many departments are experimenting with creating a visual record of the interrogation process in specific cases or classes of cases. Others employ audio taping, which offers lower technological barriers and greater availability. Who can credibly contend that an officer's testimony about reciting *Miranda* warnings (often disputed by the defendant) provides a greater guarantee of voluntariness than a verbatim visual or aural chronicle of what actually occurred in the interrogation room?

The problem is that, from the perspective of current constitutional law, courts may still be free to ignore such

a compelling record. A defendant with a *Miranda* claim need prove nothing at all about the actual voluntariness of his statement; one missing warning trumps a whole spool-ful of tape. The technicality is elevated above the reality.

But even within the warnings context itself, innovation and improvement are possible. Absent *Miranda*'s one-size-fits-all straitjacket, police would be encouraged to target warnings more appropriately to the audience at hand. Policies might be developed, for example, in which younger, first-time offenders receive more extensive explanation, while defendants with a documented record of recent law enforcement contact, who have been warned many times already, are simply asked more directly if they care to answer questions. As petitioner's supporters point out, after all, the *Miranda* warnings have become embedded in public consciousness. In a post-*Miranda* world, warnings could be measured in relation to actual knowledge, rather than merely as magic words.

Similarly, some departments have already attempted to employ post-arrest interaction for more general law enforcement purposes. In New York City, for example, police have undertaken a "debriefing" program. Arrestees who have been warned and have invoked their rights in their own cases are asked whether they wish to offer background information about criminal activity in their communities, such as drug or gun trafficking. Such debriefing statements are not for use against the maker, thus protecting the suspect's core Fifth Amendment rights. But if the Constitution is extrapolated to dictate specific interrogation procedures, then any deviation could give rise to civil liability. *See California Attorneys for*

Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999) (police questioning "outside *Miranda*" violates Constitution in itself and therefore exposes officers to civil suit, whether or not questioning resulted in any statement ever used as evidence against suspect).

The point is that, within the ambit of the voluntariness requirement, experienced law enforcement officials should be allowed to do their jobs. Since the time of *Miranda*, law enforcement has become increasingly professionalized. Numerous organizations have been formed, training programs abound, communication has increased. Along these lines, the Solicitor General argues that *Miranda* warnings are so valuable in the interrogation process that some agencies adopted warnings on their own, even without the compulsion of *Miranda*. Brief for the United States at 32-34. Yet the Solicitor General also contends that, unless the warnings are foisted on law enforcement by way of constitutional mandate, police will gradually "backslide." Brief for the United States at 37.

It is time to test these views. The states should be permitted their power in a federal system to devise their own solutions to important issues of public policy.[9] If a

---

[9] [A]ny view of the procedure we described . . . that converted it from a suggestion into a straitjacket would contravene our established practice, rooted in federalism, of allowing the States wide discretion, subject to minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy. . . . [I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down.

Smith v. Robbins, 120 S. Ct. 746, 757-58 (2000).

Remarkably, the Solicitor General cites *Smith* for the proposition that the Court can and should create, and impose on the states, prophylactic procedures that go beyond constitutional requirements. Brief for the United States at 44. This is a studied effort to turn the *Smith* ruling upside down. *Smith* actually held that the Court would not force the states to employ federally created procedures for protecting constitutional rights – even where many had assumed, for over thirty years, that those procedures were mandatory.

[10] The Brief of *Amici Curiae* Griffin B. Bell, *et al.*, 8-11, presents a series of quotations from various law enforcement officials stating their "support [for] *Miranda*." But the brief's use of these statements in support of the petitioner's position is misdirection. As many of the quotations make clear, the support expressed for "*Miranda*" means support for *Miranda* **warnings**, not necessarily support for *Miranda* **suppression**. We do not challenge the value of appropriate warnings policies. We simply want to give law enforcement professionals the ability to devise those policies, within the bounds of their expertise and the dictates of the Fifth Amendment, and without fear that the slightest deviation from formula will let a serious criminal go free.

strict regimen of warnings is as efficacious as the petitioner's supporters suggest, let it compete against other methods, in the marketplace of modern crime-fighting and under the scrutiny of vigorous litigation.[10]

To pursue that inquiry, it is necessary to explore one central myth of *Miranda*: that the rule of suppression refines voluntariness issues, simplifying the burden on police and prosecutors and facilitating the adjudication process for judges. As mentioned previously, however, the *Miranda* rule in fact encompasses various imprecise

threshold questions, such as "custody," that require just the kind of totality of circumstances analysis which *Miranda* is supposed to avert.

But even aside from that problem, it is clear that *Miranda* suppression in no way subsumes the voluntariness inquiry; on the contrary, it simply creates another way for defendants to win, on grounds that seldom have anything to do with whether a confession was coerced. If police botch the warnings, the claim is complete; there is no cause to examine the defendant's state of mind. Ironically, therefore, it may be much easier to prevail on a *Miranda* claim than on a coercion theory. And predictably, therefore, *Miranda* claims have become numerous.

That hardly means, however, that traditional voluntariness challenges have faded away over the last thirty years. The allegations are legion. Defendants say that they were beaten, bribed, blandished. Such claims often demand laborious factual inquiry, in which the presence or absence of warnings is essentially meaningless: if these dramatic assertions of coercion were really true, the reading of warnings, however scrupulously, could not save the statement.[11] This is the paradox at the heart of

[11] *E.g.*:

Green v. Scully, 850 F.2d 894 (2d Cir. 1988) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because police allegedly promised leniency, told suspect he could get the electric chair, and lied about evidence they had against him).

Hawkins v. Lynaugh, 844 F.2d 1132 (5th Cir. 1988) (rejecting claim that, although *Miranda* warnings were read, statement

Miranda. A rule of suppression devised to exclude coerced confessions usually comes into play only when the confession was in fact voluntary.

was involuntary because police allegedly promised psychiatric treatment).

United States v. Mahan, 190 F.3d 416 (6th Cir. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because officer "coerced" suspect by telling him he could get in serious trouble for lying); *United States v. Rigsby*, 943 F.2d 631 (6th Cir. 1991) (rejecting defendant's claim that, although he was read *Miranda* warnings, statement was involuntary because police threatened to "bust in" his head); *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because suspect was under influence of drugs and police were yelling and had guns drawn during questioning); *United States v. Gatewood*, 184 F.3d 550 (6th Cir. 1999) (no *Miranda* warnings claim; rejecting defendant's claim that statement was involuntary because police allegedly picked him up and threw him, and threatened to charge him with other crimes and keep him from his wife); *United States v. Starks*, 1997 U.S. App. LEXIS 12016 (6th Cir. 1997) (rejecting argument that, although suspect was read *Miranda* warnings, statement was involuntary because police threatened to turn him over to federal authorities).

Holland v. McGinnis, 963 F.2d 1044 (7th Cir. 1992) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because police allegedly beat suspect before previous statement, and lied to him about incriminating evidence against him).

Feltrop v. Delo, 46 F.3d 766 (8th Cir. 1995) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that confession was involuntary because suspect was claustrophobic, nervous, and tired, and because police coerced him by

The Solicitor General makes much of *Miranda*'s status as a "conclusive presumption" of involuntariness. Brief

---

asking if he was Christian and telling him killer had blood on his hands); *Sumpter v. Nix*, 863 F.2d 563 (8th Cir. 1988) (no *Miranda* warnings claim; rejecting claim that confession was involuntary because police allegedly promised leniency and treatment for alcoholism); *United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996) (rejecting claim that, although *Miranda* warnings given, statement was involuntary because police told suspect she would be arrested if she did not cooperate, but that if she did, they would notify prosecutor of the cooperation).

United States v. Kelley, 953 F.2d 562 (9th Cir. 1992) (no *Miranda* warnings claim; rejecting claim that statement was involuntary because suspect was going through heroin withdrawal); *Guam v. Muna*, 999 F.2d 397 (9th Cir. 1993) (no *Miranda* warnings claim; rejecting defendant's claim that statement was involuntary because police threatened to impound his car, and told him others had already implicated him).

Lucero v. Kerby, 133 F.3d 1299 (10th Cir. 1998) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police told suspect, falsely, that they had fingerprint evidence against him); *United States v. Cisneros-Cruz*, 1999 U.S. App. LEXIS 14899 (10th Cir. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because officer slamm[illegible] his fist down on table during questioning).

McCoy v. Newsome, 935 F.2d 1252 (11th Cir. 1992) (no *Miranda* warnings claim; rejecting claim that statement was involuntary because police coerced suspect by holding him for unreasonable time and threatening him with life imprisonment, and because he was under influence of alcohol and marijuana); *Moore v. Dugger*, 856 F.2d 129 (11th Cir. 1988) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that

for the United States at 43. But that presumption serves only to sharpen the dilemma. The presumption must be

---

statement was involuntary because suspect was allegedly deprived of food and sleep and was promised that he could go home if he confessed).

State v. Pettit, 979 P.2d 5 (Ariz. App. 1998) (rejecting *Miranda* warnings claim; separately addressing and accepting claim that statement was involuntary because police promised defendant that any statement he made would not be used against him).

Stevens v. State, 941 S.W.2d 411 (Ark. 1997) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police did not offer suspect food and made clear that they would continue questioning until he confessed); *Noble v. State*, 892 S.W.2d 477 (Ark. 1995) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because police appealed to defendant's religious convictions, showed him photographs of murder victim, and assured him of reliability of polygraph).

People v. Jones, 949 P.2d 890 (Cal. 1998) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police promised to intercede with prosecutor, falsely implied that they had other inculpatory evidence, and told suspect that the truth would set him free).

People v. Hutton, 831 P.2d 486 (Colo. 1992) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police informed suspect that he had flunked polygraph); *People v. Gennings*, 808 P.2d 839 (Colo. 1991) (rejecting claim that, although *Miranda* warnings were read, statement was involuntary because polygrapher threatened to report results to suspect's employer).

State v. Pinder, 736 A.2d 857 (Conn. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because police said that polygraph results could be used in court, that victim's parents had right to know what happened, and that suspect would be better off if he told truth); *State v. LaPointe*, 678 A.2d 942 (Conn. 1996) (rejecting

conclusive precisely because it is a legal fiction. The truth is that the absence of warnings, in itself, cannot overcome

---

Miranda warnings claim; separately addressing and rejecting claim that statement was involuntary because defendant had a dependent personality disorder, and because police told him, falsely, that his fingerprints were on the murder weapon); *State v. Casiano*, 740 A.2d 435 (Conn. App. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because police promised defendant he would only get ten years).

State v. Gella, 988 P.2d 200 (Hawaii 1999) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because the defendant had been struck by police during his arrest, still felt dizzy and in pain, and had not slept in four days).

People v. Hardaway, 718 N.E.2d 682 (Ill. App. 1999) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because defendant was not allowed opportunity to consult with parents or youth officer).

Light v. State, 547 N.E.2d 1073 (Ind. 1989) (rejecting claim that, although *Miranda* warnings given, statement was involuntary because suspect was drowsy, and because police gave him false legal advice and told him they had a letter incriminating him).

State v. Reid, 394 N.W.2d 399 (Iowa 1986) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because defendant was mentally retarded and police falsely told him that victim's hymen had been perforated).

State v. Jones, 984 P.2d 132 (Kan. 1999) (no *Miranda* warnings claim; rejecting claim that statement was involuntary because police allegedly promised to have charges reduced to involuntary manslaughter).

State v. Wilms, 449 So. 2d 442 (La. 1984) (rejecting claim that, although *Miranda* warnings given, statement was involuntary because police allegedly promised to release suspect's pregnant, ill wife, who had been arrested with him).

evidence of free will such as a videotape or a proven record of familiarity with one's rights. The presumption serves, in effect, as an exercise of judicial fiat to achieve a particular policy choice about police practices.

Those policy choices should not be the exclusive province of the courts; the responsibility must be shared by elected and executive officials charged with the duty to shape and manage the criminal justice system. The Congressional statute at issue is an appropriate exercise of that responsibility.

Williams v. State, 732 A.2d 376 (Md. App. 1999) (rejecting *Miranda* warnings claim; separately addressing and rejecting claim that statement was involuntary because suspect had a hangover).

Commonwealth v. Edwards, 651 N.E.2d 398 (Mass. 1995) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because police told defendant, falsely, that his handprint had been found at murder scene); *Commonwealth v. St. Peter*, 722 N.E.2d 1002 (Mass. App. 1999) (rejecting claim that, although *Miranda* warnings were administered, statement was involuntary because defendant was under influence of drugs and alcohol and in pain from tooth extraction).

People v. Sexton, 580 N.W.2d 404 (Mich. 1998) (rejecting claim that, although *Miranda* warnings were given, statement was involuntary because suspect was deprived of food and sleep for 21 hours).

State v. Collins, 446 P.2d 325 (Wash. 1968) (rejecting claim that, although defendant was advised of his rights, statement was involuntary because police promised him reduced sentence).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

HONORABLE STUART VANMEVEREN
District Attorney, 8th Judicial District, Colorado
President, National District Attorneys Association
99 Canal Center Plaza
Suite 500
Alexandria, VA 22314

JEFFREY C. SULLIVAN
Prosecuting Attorney
LAURI BOYD
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney's Office
128 N. 2d Street, Room 211
Yakima, WA 98901

ROBERT OLSON
Chief, Minneapolis Police
President, Police Executive Research Forum
CHUCK WEXLER
Executive Director
1120 Connecticut Avenue
Suite 930
Washington, D.C. 20036

LYNNE ABRAHAM
District Attorney
RONALD EISENBERG*
Deputy District Attorney
Philadelphia District Attorneys Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700
*(*Counsel of Record*)

(Additional Organizations Listed In Appendix Attached Hereto)

ADDITIONAL ORGANIZATIONS JOINING BRIEF

Honorable John M. Tyson Jr.
District Attorney, 13th Judicial Circuit, Alabama
President, Alabama District Attorneys Association

Honorable Charles Hastings,
County Attorney
Yavapai County, Arizona
Chairman, Arizona Prosecuting Attorneys' Advisory Council

Honorable Grover Trask
District Attorney
Riverside County, California
President, California District Attorneys Association

Honorable William Ritter
District Attorney, 2nd Judicial District, Colorado
President, Colorado District Attorneys Council

Honorable Brad King
State Attorney, Fifth Judicial Circuit, Florida
President, Florida Prosecuting Attorneys Association

Honorable Kermit McManus
District Attorney, Conasauga Judicial Circuit, Georgia
President, Georgia District Attorney Association

Honorable Kipp Manwaring
Prosecuting Attorney, Bonneville County, Idaho
President, Idaho Prosecuting Attorneys Association

Honorable Robert Gevers, II
Prosecuting Attorney, 38th Judicial Circuit, Indiana
President, Association of Indiana Prosecuting Attorneys

Honorable Julie McKenna
County Attorney
Saline County, Kansas
President, Kansas County and District Attorneys Association

Honorable Joseph I. Casserly
State's Attorney
Harford County, Maryland
President, Maryland State's Attorney Association

Honorable Brian Mackie
Prosecuting Attorney
Washtenaw County, Michigan
President, Prosecuting Attorneys Association of Michigan

Honorable Mary O'Donnell
State's Attorney
Rolette County, North Dakota
President, North Dakota State's Attorneys Association

Honorable Christine A. Cooke
County Attorney
Big Horn County, Montana
President, Montana County Attorney's Association

Honorable Michael Spahr
Prosecuting Attorney
Washington County, Ohio
President, Ohio Prosecuting Attorneys Association

Honorable Ellen Totzke
County Attorney
Hall County, Nebraska
President, Nebraska County Attorneys Association

Honorable Dianne Barker
Harrold, District Attorney, 27th District, Oklahoma
President, Oklahoma District Attorneys Council

Honorable John B. Dangler
County Prosecutor
Morris County, New Jersey
President, New Jersey Prosecutor's Association

Honorable Jack L. Banta
District Attorney
Douglas County, Oregon
President, Oregon District Attorneys Association

Honorable Jeanine Pirro
District Attorney
Westchester County, New York
President, New York District Attorneys Association

Honorable John C. Morganelli,
District Attorney,
Northampton County, Pennsylvania
President, Pennsylvania District Attorneys Association

Honorable Richard E. Trodden
Commonwealth's Attorney
Arlington County, Virginia
President, Virginia Association of Commonwealth's Attorneys

Mar 9 2000

(24)

Supreme Court, U.S.
FILED
MAR 9 2000
CLERK

No. 99-5525

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS GENERAL OF THE UNITED STATES WILLIAM P. BARR AND EDWIN MEESE III SUPPORTING AFFIRMANCE

ANDREW G. MCBRIDE
Counsel of Record for Amici Curiae
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

35pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The *Miranda* Warnings Are Not Required by the Constitution 4

II. Inflexible Application of the *Miranda* Decision and Its Progeny Hinder Effective Law Enforcement 9

III. Section 3501 is a Fully Constitutional Congressional Response to Evaluating the Admission of Confessions in Federal Court 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Roberson, 486 U.S. 675 (1988) 11, 12

Bush v. Lucas, 462 U.S. 367 (1983) 17

Colorado v. Connelly, 479 U.S. 157 (1986) 2

Davis v. United States, 512 U.S. 452 (1994) 11

Duckworth v. Eagan, 492 U.S. 195 (1989) 6, 18

Edwards v. Arizona, 451 U.S. 477 (1981) 11, 12, 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6

Michigan v. Tucker, 417 U.S. 433 (1974) 2, 6, 7, 9

Minnick v. Mississippi, 498 U.S. 146 (1990) 13

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Mistretta v. United States, 488 U.S. 361 (1989) 5

Moran v. Burbine, 475 U.S. 412 (1986) 6

New York v. Quarles, 467 U.S. 649 (1984) 2, 6, 7, 9

Oregon v. Elstad, 470 U.S 298 (1985) 8, 9, 10

Rhode Island v. Innis, 446 U.S. 291 (1980) 10

Schweiker v. Chilicky, 487 U.S. 412 (1988) 17

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 5

Thompson v. Keohane, 516 U.S. 99 (1995) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Leon, 463 U.S. 889 (1983) 11, 16, 17

Wong Sun v. United States, 371 U.S. 471 (1963) 8

CONSTITUTION AND STATUTES

U.S. CONST. amend. IV 8, 11, 16

U.S. CONST. amend. V 2, 3, 6, 7, 8, 16

18 U.S.C. § 3501 ..... *passim*

OTHER

Memorandum from Larry R. Parkinson, General Counsel, FBI, to Eleanor D. Acheson, Assistant Attorney General, OPD (Oct. 19, 1999) 13

Memorandum from Robert C. Gleason, Deputy Chief Counsel, DEA, to Patty Stemler, Department of Justice, Criminal Division, Appellate Section (undated) 13

Memorandum from Richard A. Fiano, Chief of Operations, DEA, to Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Policy Development (Oct. 13, 1999) 14

The Improvement and Reform of Law Enforcement and Criminal Justice in the United States: Hearings Before the House Select Committee on Crime, 91st Cong., 1st Sess. 250 (1969) 8

Memorandum from Will Wilson, Assistant Attorney General Criminal Division to United States Attorneys (June 11, 1969), *reprinted in* 115 Cong. Rec. 22,236-37 (1969) 8

Report of the Attorney General on the Law of Pre-Trial Interrogation (February 12, 1986), *reprinted in* 22 U. Mich. J.L. Ref. 437 (1989) 8

INTEREST OF *AMICI CURIAE*

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. The Honorable William P. Barr also served as Deputy Attorney General of the United States from 1990 to 1991 and as Assistant Attorney General, Office of Legal Counsel from 1989 to 1990. The Honorable Edwin Meese III also served as Deputy District Attorney for Alameda County, California from 1959 to 1967 and as Vice Chairman of the California Organized Crime Control Commission from 1976 to 1980. *Amici* have a strong interest in promoting fair and effective law enforcement and believe that the statute at issue in this case, 18 U.S.C. § 3501, is consonant with that goal. *Amici* are also uniquely qualified to inform the Court as to the past positions of the United States Department of Justice regarding the constitutionality of Section 3501 and the harmful effects upon the administration of justice wrought by rigid adherence to the exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436 (1966).[1]

---

[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of those written consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), announced a prophylactic rule that is not itself required by any provision of the United States Constitution. That fact, stated in *Miranda* itself, is confirmed by the twenty-five years of this Court's *Miranda* jurisprudence since *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). It is undisputed that *Miranda* thus "overprotects" the constitutional values at stake, and results in the suppression of voluntary and highly probative statements in federal criminal trials. *See* Brief for the United States ("Gov't Br.") at 31 ("There are undeniably instances in which the exclusionary rule of *Miranda* imposes costs on the truth-seeking function of a trial, by depriving the trier of fact of 'what concededly is relevant evidence.' ") (quoting *Colorado v. Connelly*, 479 U.S. 157, 166 (1986)). This Court's numerous decisions allowing the admission of evidence taken without strict compliance with the *Miranda* warnings cannot be reconciled with the proposition that the warnings are themselves required by the Fifth Amendment. In particular, the "public safety" exception recognized in *New York v. Quarles*, 467 U.S. 649 (1984), is flatly inconsistent with the view espoused by Petitioner, the Government, and their supporting *amici* that the warnings themselves are a constitutional requirement. This Court's decision in *Miranda* expressly invited legislative experimentation in the area of the law of confessions. Nor was that invitation, as Petitioner would have it, limited to mere adjustments in the phraseology of the warnings themselves.

As Attorneys General of the United States, we took the official position that *Miranda* was a non-constitutional prophylaxis, that Section 3501 was a fair and balanced

response to the *Miranda* Court's invitation to legislative action, and that Section 3501 was fully constitutional. Federal prosecutors were free to raise the statute in response to suppression motions in federal court during our tenure. Pursuant to our general duty to defend federal statutes, we stood ready to defend the constitutionality of Section 3501 in the courts of appeals and before this Court. The position taken by the Department of Justice as respondent in this case is thus a sharp break with the Department's past positions and, in our view, is inconsistent with its solemn duty to defend the validity of all federal statutes unless no reasonable argument can be made in support of their constitutionality.

Rigid application of the suppression rule of *Miranda* does hinder effective law enforcement on both the state and federal levels. Particularly in the prosecution of drug trafficking cases, the cooperation of members of a conspiracy is critical to effective prosecution of the drug enterprise root and branch. As the memoranda lodged with the Court demonstrate, the Drug Enforcement Administration ("DEA") expressed these concerns to the Department of Justice and urged the Department to defend Section 3501. The Federal Bureau of Investigation ("FBI") expressed similar concerns regarding some of the sub-doctrines spawned by *Miranda*. This complex of subdoctrines that surrounds the *Miranda* decision can be mystifying to even the most well-trained law enforcement officers. Replacing *Miranda*'s focus on the subsidiary issues of "custody" and "interrogation" with the examination by the trial court and the jury of the central issue of voluntariness will advance Fifth Amendment values and the accuracy of criminal verdicts.

Section 3501 is a measured and balanced response to the admission of confessions in federal court. It allows the trial judge to place whatever weight is appropriate upon the various factors that can affect the knowing and intelligent waiver of constitutional rights. Moreover, it ensures that the jury will also be allowed to weigh these same factors – thus creating a strong incentive for law enforcement officers to continue to give the warnings. Particularly since federal law enforcement officers are well-trained and have uniformly represented that they will continue to employ the *Miranda* warnings, Section 3501 is a fully constitutional response to the admission of confessions in federal court. The Court should continue to adhere to *Miranda* in state prosecutions until confronted with a State's concrete response to the *Miranda* Court's legislative invitation.

ARGUMENT

I. The *Miranda* Warnings Are Not Required by the Constitution.

In *Miranda* itself, the Court recognized the limits of its ruling and the fact that the Legislative Branch had a role to play in determining the admissibility of confessions in federal court. At the outset, the Court characterized its holding as requiring the exclusion of a criminal suspect's statement unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. The Court emphasized that legislative authority remained intact in this area:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

Id. at 467. The *Miranda* Court's recognition that the Constitution itself does not dictate use of warnings and its discussion of legislative "creativity," are fatal to Petitioner's view that *Miranda* disables the legislature from adopting a different approach. *See also id.* at 477 ("[u]nder the system of warnings we delineate *today or under any other system which may be devised and found effective*") (emphasis added).

Petitioner and the United States would convert the *Miranda* Court's invitation to legislative action into an empty gesture. Brief of Petitioner ("Pet'r Br.") at 18; Gov't Br. at 30-33. Under their view, all that a legislature can do is slavishly adopt the essence of the *Miranda* warnings. However, as the portions of the *Miranda* opinion cited above demonstrate, the Court was not discussing mere grammatical variations when it recognized legislative authority in this area. Criminal procedure is an area of shared legislative and judicial authority. *See Mistretta v. United States*, 488 U.S. 361, 384-91 (1989).[2] The *Miranda* opinion itself certainly does not support the notion that

[2] *See also Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of the federal courts . . . . ").

the Court was invoking its authority under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to preclude any further Article I role in assessing the admissibility of confessions in federal court. *See Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("The *Miranda* rule is not, *nor did it ever claim to be*, a dictate of the Fifth Amendment itself.") (emphasis added).[3]

This insight from the text of the *Miranda* opinion itself is confirmed by subsequent decisions of this Court. Try as they might, Petitioner, the Government, and their *amici* simply cannot reconcile the language of these opinions and, more importantly, their results with the view that *Miranda* warnings are required by the Fifth Amendment. *See, e.g., Tucker*, 417 U.S. at 444 ("The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures designed to insure that the right against compulsory self-incrimination was protected."); *Quarles*, 467 U.S. at 658 ("[A]bsent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence . . . . "); *Moran v. Burbine*, 475 U.S. 412, 424-25 (1986) ("As is now well established, [the] . . . *Miranda* warnings are not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory

[3] Indeed, the Fifth Amendment itself states in relevant part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The concept that unwarned but nonetheless knowing and voluntary confessions violate this command would seem to confront an insurmountable textual hurdle.

self-incrimination [is] protected.") (internal quotations omitted; citations omitted). The attempt to reconcile this twenty-five year line of precedents with the view that the warnings are constitutionally required reduces the Government to exercises in linguistic nonsense. *See, e.g.*, Gov't Br. at 40 ("[T]he Court's statements that *Miranda*'s 'prophylactic' requirements sweep more broadly than does the Self-Incrimination Clause itself do not invalidate *Miranda*'s status as a Fifth Amendment decision.").[4]

Even more troubling, if Petitioner and his supporters are correct in their view of *Miranda* as a constitutional mandate, this Court's decision in *Quarles* must be reexamined. If the warnings themselves are constitutionally required, then *Quarles* improperly sanctions the admission in the government's case-in-chief of evidence taken in violation of the Fifth Amendment.[5] A host of other doctrines would also require reexamination, notably the Court's refusal to apply the "fruit of the poisonous tree" doctrine to *Miranda* violations. If the warnings constitute a "core" constitutional necessity (like probable cause in

[4] This statement is either self-contradictory or suggests that *Miranda* is based on some part of the Fifth Amendment other than the Self-Incrimination Clause. Its tortured nature highlights the dilemma faced by those who would attempt to erase the significance of twenty-five years of this Court's jurisprudence since *Michigan v. Tucker*, 417 U.S. 433 (1974), that treats *Miranda* as a non-constitutional decision.

[5] The *Quarles* decision has been critical to law enforcement's ability to defuse dangerous situations to the benefit of the victims of crime. *See generally* Concern for Possible Victim (Rescue Doctrine) as Justifying Violation of Miranda Requirements, 9 A.L.R. 4th 494 (1981 & 1988 Supp.) (listing cases).

the Fourth Amendment context) then there is no ground for exempting them from the doctrine announced in *Wong Sun v. United States*, 371 U.S. 471 (1963). Therefore, the Court would have to reexamine the result in *Oregon v. Elstad*, 470 U.S. 298 (1985), in light of any ruling that unwarned confessions are themselves taken in violation of the Fifth Amendment.

Indeed, as early as 1969, the Department of Justice took the position that the *Miranda* warnings were not a constitutional requirement and that Section 3501 was therefore within Congress' power over the admission of evidence in federal court. *See, e.g.*, The Improvement and Reform of Law Enforcement and Criminal Justice in the United States: Hearings Before the House Select Committee on Crime, 91st Cong., 1st Sess. 250 (1969) (statement of Attorney General John N. Mitchell). *See also* Memorandum from Will Wilson, Assistant Attorney General Criminal Division to United States Attorneys (June 11, 1969), *reprinted in* 115 Cong. Rec. 22,236-37 (1969). In 1986, the Department of Justice undertook a detailed analysis of *Miranda*, this Court's post-*Miranda* jurisprudence, and Section 3501. *See* Report of the Attorney General on the Law of Pre-Trial Interrogation (Feb. 12, 1986), *reprinted in* 22 U. Mich. J.L. Ref. 437 (1989). That Report concluded that Section 3501 was a valid congressional response to *Miranda*'s legislative invitation.

Consistent with the Department of Justice's position since 1969, it was our policy as Attorneys General of the United States that Section 3501 was constitutional and that it should be raised by United States Attorney's

Offices in defense of motions to suppress.[6] The present position of the Department of Justice is a sharp reversal of years of practice and, in our view, is inconsistent with the important duty of the Department of Justice to defend all federal statutes unless no reasonable argument can be made as to the statute's constitutionality.[7] This Court should reject the arguments of Petitioner, the Government, and their *amici* and instead reaffirm the proposition that the warnings themselves are not constitutionally required. The Court should decline Petitioner's invitation to undermine the doctrinal underpinnings of the Court's holdings in *Tucker*, *Elstad*, and *Quarles*.

II. Inflexible Application of the *Miranda* Decision and Its Progeny Hinder Effective Law Enforcement.

As former Attorneys General of the United States, *amici* collectively represent years of experience as the Nation's chief law enforcement officer. We can tell the Court without hesitation that the unyielding application

---

[6] We have attached as an appendix to this brief, letters written by each of the *amici* and Attorney General Dick Thornburgh in response to an inquiry from Senator Thurmond regarding the position of the Department of Justice from 1985 through 1993 regarding the constitutionality of Section 3501. These letters conclusively establish that any characterization of the Department of Justice's present position as "longstanding" has no basis in fact.

[7] Indeed, the fact that the United States Attorney's Office raised Section 3501 in its reconsideration motion before the district court in this very case provides further evidence that the Department's position that Section 3501 is unconstitutional is a newly-minted one.

of *Miranda* and the complex of sub-doctrines it has spawned does indeed have a detrimental effect on enforcement of the federal criminal law. *Miranda* has its most dramatic negative impact in the area where effective law enforcement is most critical to our Nation's future – drug trafficking prosecutions.

We respectfully disagree with the assertion of the Government and certain *amici* that *Miranda* is beneficial to law enforcement officers because its strictures "provide clear guidance to law enforcement officers." Gov't Br. at 9-10; Brief of Griffin B. Bell, *et al.* as *Amici Curiae* in Support of Petitioner ("Bell Br.") at 11-19. In fact, application of *Miranda* itself is dependent on a highly fact-bound inquiry into the nature of "custody" and the nature of "interrogation." *See, e.g., Elstad*, 470 U.S. at 309 ("[T]he task of defining 'custody' is a slippery one."); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("interrogation" defined as "any words or actions on the part of police (other than those normally attendant to arrest and custody) that they should have known were reasonably likely to elicit an incriminating response from the suspect") (footnotes omitted); *id.* at 305 (Marshal, J., dissenting) (agreeing with two-part test but disagreeing with its application to the facts before the Court); *see also id.* at 307, 312-13 (Stevens, J., dissenting) (discussing use of interrogatory or declarative sentences as bearing on the presence or absence of interrogation).

As the transcript of the suppression hearing in this case demonstrates, examination of the issues of "custody" and "interrogation" *already* requires the district court to take the very same evidence necessary to evaluate voluntariness under Section 3501. See Joint Appendix ("J.A.") at 35-74 (Testimony of Special Agent Lawlor).

Miranda saves no judicial resources and, by focusing on the subsidiary issues of "custody" and "interrogation," distracts judicial inquiry from the central constitutional issue; *viz.*, was the statement compelled or voluntary?

Moreover, many of the complicated sub-doctrines flowing from *Miranda* can act as a trap for even the best-trained police officers. The Government concedes (as it must given the lodged letters from DEA and FBI) that these doctrines flowing from *Miranda* do have substantial law enforcement costs. Gov't Br. at 31-37. Fair, honest and good faith decisions by police officers regarding "custody," *see Thompson v. Keohane*, 516 U.S. 99, 112 (1995), "interrogation," *see Innis*, 446 U.S. 291, or whether rights have been invoked, *see Davis v. United States*, 512 U.S. 452 (1994), that are later adjudged incorrect in federal court often result in the suppression of voluntary and probative confessions of guilt. The doctrines of *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988), can result in the exclusion of probative evidence years after invocation, in another jurisdiction, during questioning regarding a different crime.

The Government responds that a "good faith" exception, similar to that recognized in *United States v. Leon*, 463 U.S. 889 (1983), in the Fourth Amendment context, may be appropriate for some of the *Miranda* subdoctrines. Gov't Br. at 35-36 & nn.25 & 26. How *Edwards* and *Roberson* can be decoupled from what the Government otherwise refers to as the "core holding of *Miranda*," *id.* at 31, is nowhere explained in the Government's submission. If, as the Government contends, the warnings themselves *and* some mechanism to ensure that the exercise of the rights contained in the warnings will be "scrupulously

honored," Gov't Br. at 28 (quoting *Miranda*, 384 U.S. at 478-79), is a constitutional minimum dictated by the Fifth Amendment, then no relaxation of the *Edwards* or *Roberson* doctrines is constitutionally permissible. If the Government does in fact support a "good faith" exception to certain *Miranda* doctrines, then *per force* it concedes the constitutionality of Section 3501, at least in *Edwards* and *Roberson* cases, because Section 3501 is essentially a good faith rule. The statute allows the Court to admit probative, voluntary statements where (as here) federal agents make a technical error under *Miranda* or its progeny and both a judge and a jury conclude that the error did not result in unconstitutional compulsion.[8]

Respondent's brief represents that, "federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations and the issuance of the *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect." Gov't Br. at 34. After the filing of the Government's brief, Professor Cassell, counsel appointed by the Court to defend the judgment, requested the letters written by law enforcement agencies in response to a Justice Department inquiry regarding the effects of *Miranda*. Those letters, now lodged with the Court, tell a very different story from that suggested in the Government's brief. As noted

---

[8] We respectfully suggest that the Court inquire of the Government at oral argument whether, as its brief intimates, it supports a "good faith" exception to the *Edwards-Roberson* rules, which the Government seems to concede are not constitutionally required and do present a substantial problem for law enforcement.

above, the Memorandum from the FBI details significant law enforcement problems created by application of the Court's interpretations of *Miranda* in *Edwards v. Arizona* and *Minnick v. Mississippi*, 498 U.S. 146 (1990). See Memorandum from Larry R. Parkinson, General Counsel, FBI, to Eleanor D. Acheson, Assistant Attorney General, OPD, at pp. 1-2 (Oct. 19, 1999). The FBI Memorandum indicates that these applications of *Miranda* "have had an impact on numerous FBI investigations." *Id.* at 2.

Two lodged memoranda from the DEA are even more illuminating. One DEA memorandum flatly states: "[W]e believe that the automatic exclusion from evidence of all statements that do not comply with the *Miranda* rule is harmful to the administration of justice." Memorandum from Robert C. Gleason, Deputy Chief Counsel, DEA, to Patty Stemler, Department of Justice, Criminal Division, Appellate Section, p. 1 (undated). This memorandum urges the Department of Justice to defend Section 3501 in no uncertain terms:

> - We do not think that a relaxation in the exclusionary rule will lead our Agents to disregard *Miranda*, but it could save important evidence in cases where the strict requirements of *Miranda* are not satisfied for some reason that does not affect the voluntariness of the statement. Therefore, we are in favor of seeking such a ruling from the Supreme Court.

Id. A second DEA memorandum from October, 1999 is even more emphatic. The memorandum outlines what every DEA agent and prosecutor in the country knows – breaking large-scale drug trafficking organizations depends upon information provided by members of the

organization under pressure from law enforcement. *See* Memorandum from Richard A. Fiano, Chief of Operations, DEA, to Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Policy Development (Oct. 13, 1999). The memorandum further states: "The methods used by DEA to investigate drug organizations highlight the need to reform the formal, prophylactic requirements of *Miranda*." *Id.* at 1. This DEA memorandum urges the Department of Justice to defend the Fourth Circuit's ruling in this very case. *Id.*[9]

These memoranda belie the Government's representations that *Miranda* has minimal costs and that, on balance, law enforcement supports rigid application of *Miranda*. Indeed, the DEA and FBI alone, which both expressed concerns regarding *Miranda*, account for a large percentage of prosecutions in federal court. The concerns expressed in these memoranda are fully consistent with our own experience as the Nation's chief prosecutors. Moreover, the vast array of state and local law enforcement *amici* supporting the judgment in this case bear witness to the fact that the *Miranda* rule has real

---

[9] The Solicitor General has lodged a third DEA memorandum which purports to backtrack from the statements made in the first two DEA memoranda. This extraordinary third DEA memorandum is dated February 22, 2000. Thus, it was created months after the Department of Justice determined its position in this case and four days after Professor Cassell requested that the Solicitor General provide the law enforcement memoranda transmitted to the Department of Justice relative to Section 3501. The circumstances surrounding the creation of this dubious memorandum suggest that it was specifically prepared for this litigation *after* it became clear the other memoranda would have to be released.

costs in evidence lost and guilty criminals escaping any punishment for their crimes.

III. Section 3501 is a Fully Constitutional Congressional Response to Evaluating the Admission of Confessions in Federal Court.

Section 3501 represents a measured and balanced response to the admission of confessions in federal court. First, it retains the requirement of warnings as a factor in the trial court's analysis. Nor does it dictate how much weight this or any other factor should be given by the court. Thus, the presence or absence of warnings can be given whatever weight the trial judge sees fit. In the case of a younger defendant, a first-time offender, or a person of limited education or mental capacity, the absence of warnings might well be a central factor in the court's analysis. By contrast, in the case of an older, college-educated recidivist who specializes in complex bank fraud schemes, the absence of warnings would be of relatively little importance. Second, Section 3501 makes clear that "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give weight to the confession *as the jury feels it deserves under all the circumstances*." 18 U.S.C. § 3501(a) (emphasis added). Defense counsel can be sure to bring the absence of warnings to the attention of the jury in any case where the arresting officers fail to provide them. This right, plus a jury instruction on the issue, constitutes a significant protection in Section 3501 not contained in *Miranda* itself. Finally, Section 3501 allows the Court to consider whether the suspect was informed of the nature of the offense at issue. *Id.* § 3501(b)(2). This

reveals to the suspect something about the knowledge of the police, while allowing the suspect to evaluate the gravity of his circumstances.

Thus, Section 3501 retains the incentive created by *Miranda* to train police officers to give warnings and to use written waivers of *Miranda* rights. No reputable law enforcement agency would change its policy regarding warnings because they are now simply a factor to be considered by the judge and the jury.[10] Yet, Section 3501 allows society to benefit from competent and constitutionally admissible evidence where police do not give warnings due to inadvertence or a determination concerning custody or interrogation that is later found to be erroneous by a court of law.

In this sense, the revision worked by Section 3501, a statute enacted by Congress, is narrower than the exception to the exclusionary rule recognized by this Court in *United States v. Leon*. Under the *Leon* rule evidence seized in violation of the Fourth Amendment is admitted in federal and state court when the police officers acted in the good faith belief that an arrest or search warrant signed by a magistrate was indeed valid. Under Section 3501, the Fifth Amendment's dictate against compelled confessions is fully respected – they are never admissible

---

[10] We thus respectfully disagree with the suggestion in the brief of *amici curiae* Griffin Bell, *et al.* that law enforcement officers will "dispense with warnings and adopt more aggressive interrogation techniques," in response to application of Section 3501. Bell Br. at 18. The disincentives to do so include possible suppression as well as the jury being fully informed of such tactics. In this sense, Section 3501 may be a more effective deterrent to coercive police behavior than is *Miranda*.

in federal court. Moreover, unlike the *Leon* rule, the jury gets to hear and evaluate evidence of the alleged constitutional violation under Section 3501.

We disagree with Petitioner and the Government that the proper framework to evaluate Section 3501 is this Court's *stare decisis* jurisprudence. This is not a case where the Court has simply been asked to reexamine its own precedents. Congress, a coordinate branch with constitutional authority in this area, has expressed its will through legislation. That legislation enjoys a presumption of constitutionality. If *Miranda* is a non-constitutional ruling, no party disputes that Section 3501 must be upheld. Even if *Miranda* has some constitutional underpinnings, Section 3501 easily falls within Congress' authority to establish its own remedial scheme for constitutional violations. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 386 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

Finally, both Petitioner and the Government seem to contend that, regardless of the legal merits of this case, the notoriety of the *Miranda* warnings and their place in popular culture are extraordinary considerations requiring the Court to invalidate Section 3501. Pet'r Br. at 44-45; Gov't Br. at 49-50. First, this Court is obviously not an arbiter of popular culture, nor should the temperature of the public zeitgeist affect this Court's rulings. Second, Section 3501 is itself an expression of popular will in the uniquely powerful form sanctioned by the Constitution itself – bicameralism and presentment. Third, as demonstrated above, a decision upholding Section 3501 does not "overrule" *Miranda* and will not work any substantial change to federal law enforcement training or practice. It will simply result in the admission of probative evidence

in cases like this one, where well-trained federal officers make a good faith error. Finally, the position taken by Petitioner and the Government ignores the other side of the coin – the public disdain for law enforcement created by a system that elevates technical rules over considerations of guilt and the proper punishment of serious crime. As Justice O'Connor has noted:

> While federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal justice system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns.

Eagan, 492 U.S. at 211-12 (O'Connor, J., concurring). Section 3501 offers an opportunity to retain many of the benefits of *Miranda* while mitigating the harm to law enforcement from its more "perverse" applications. The rule of law and the perception of the law is enhanced by such a statute, not diminished.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

March 9, 2000

Respectfully submitted,

THE HONORABLE WILLIAM P. BARR
THE HONORABLE EDWIN MEESE III
Former Attorneys General of the United States

ANDREW G. MCBRIDE
Counsel of Record for Amici Curiae
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

William P. Barr

July 22, 1999

The Honorable Strom Thurmond
Chairman
Subcommittee on Criminal Justice Oversight
United States Senate
Washington, DC 20515

Dear Mr. Chairman:

This letter responds to your questions regarding the Department of Justice's views and positions on 18 U.S.C. § 3501 during my tenure as Attorney General in the Administration of President George W. Bush. This letter is based on my own recollection as well as consultation with people who served in the Department of Justice during the Bush Administration.

It was the position of the Department of Justice during my tenure as Attorney General that *Miranda v. Arizona's* procedural requirements and its per se exclusionary rule were not constitutionally mandated. We made arguments to this effect in the United States Supreme Court, *see, e.g.;* Brief for the United States as Amicus Curiae in *Withrow v. Williams,* No. 91-1030; Brief for the United States as Amicus Curiae in *Parke v. Raley,* No. 91-719. In some cases, the Department of Justice also participated as amicus curiae in support of the State in the lower federal courts. Our legal position in this regard was based in large part upon the report issued by the Office of Legal policy in the previous administration and upon subsequent Supreme Court decisions which made it clear that the *Miranda* regime was not required by the Fifth Amendment.

We also took the position that 18 U.S.C. § 3501 was constitutional as an exercise of Congress' authority to control the admission of evidence before federal courts. As the senior officer of the prosecuting arm of the Executive Branch, I believed that the Department of Justice should be prepared to use all of the legal tools at its disposal, within constitutional bounds, to seek the conviction of the guilty and exoneration of the innocent. This certainly included making a criminal defendant's voluntary statements regarding the crime available to the finder of fact. Accordingly, during my tenure, the United States Attorneys' Offices were authorized and encouraged to raise 18 U.S.C. § 3501 as an argument for the admission of reliable evidence of guilt that would otherwise be kept from juries by the *Miranda* doctrine. As far as I am aware, no case during my tenure as Attorney General was a United States Attorneys' Office prohibited from relying upon section 3501 in any forum.

In 1991, I instructed a Special Assistant to the Attorney General to undertake the task of locating a test case for the constitutionality of 18 U.S.C. § 3501. Contacts were made with United States Attorneys' Offices to find an appropriate case where the issue could be raised and preserved for appellate review. Although no proper vehicle for pursuing the issue was generated prior to the end of the Administration, the effort demonstrates the Bush Administrations commitment to use and defend section 3501 and seek a definitive adjudication as to its constitutionality.

To summarize, during my tenure as Attorney General of the United States: 1) we adhered to the position of prior Administrations that *Miranda's* procedural requirements

and exclusionary rule were not constitutionally mandated; 2) we took the position that section 3501 was a constitutional exercise of Congress' authority over the admissibility of evidence in federal court; 3) we authorized the United States Attorneys' Offices to use section 3501 to promote the admissibility of reliable evidence of guilt in federal criminal prosecutions; and 4) we stood ready to defend the constitutionality of the statute in the Courts of Appeals and the United States Supreme Court.

I hope this letter is of assistance to you and that it helps to clarify the historical record as to the position of the Department of Justice regarding the constitutionality of 18 U.S.C. § 3501.

Sincerely,

/s/ W P Barr
William P. Barr

Dick Thornburg

October 7, 1999

Honorable Strom Thurmond, Chairman
Subcommittee on Criminal Justice Oversight
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

This letter responds to your questions concerning the positions the Department of Justice took during my tenure as Attorney General on the constitutional status of various aspects of *Miranda* and 18 U.S.C. § 3501.

As to *Miranda*, by the time I became Attorney General, I believe the Department viewed it as clear from the Supreme Court's cases that the warnings set out in that case were not themselves constitutional rights, but were rather, as the Court had by that time said repeatedly, prophylactic devices intended to add an extra layer of protection to the rights set out in the Fifth Amendment. We routinely described the warnings that way in our Supreme Court briefs, *see, e.g., Minnick v. Mississippi*, No. 89-6332, Brief for the United States as Amicus Curiae Supporting Petitioner; *Michigan v. Harvey*, No. 88-512, Brief for the United States as Amicus Curiae Supporting Petitioner, and I assume we did so in our briefs in the lower federal courts.

Likewise, we regularly argued that *Miranda's* exclusionary rule was not constitutionally required, distinguishing it from the rule requiring exclusion of coerced confessions, which came directly from the Fifth Amendment. Therefore, for example, we argued that since a per

se exclusionary rule will inevitable result in the exclusion of some voluntary confessions, Miranda's exclusionary rule should not be applied in cases where the risk of coercion against which Miranda sought to protect was slight, *see, e.g., Minnick v. Mississippi, supra.* Likewise, we argued against application of *Miranda's* exclusionary rule when the additional deterrence that would stem from it was limited, and the harm to the search for truth that a criminal trial is supposed to serve would be great. *See, e.g., Michigan v. Harvey, supra.* We noted that such considerations were legitimate in deciding the scope of *Miranda's* exclusionary rule precisely because it "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985), whereas they had no role in deciding the scope of the Fifth Amendment's exclusionary rule, which bars admission of compelled self-incrimination without regard to policy considerations of this type. Brief in *Minnick, supra;* brief in *Harvey, supra.*

With regard to § 3501, I do not remember any cases or discussions within the Department that I was aware of that related to the invocation of that statute during my tenure as Attorney General. At the same time, I certainly know of no policy that would have prevented individual U.S. Attorneys from making arguments based on this provision. In fact, while I was not aware of it at the time, I have recently learned that while I was Attorney General, at least one U.S. Attorney did invoke the provision in at least one district court case.

Finally, I do not believe the question of whether to defend the constitutionality of § 3501 came up during my tenure. What I can say, however, is that when an Act of

Congress is challenged as unconstitutional, the Department of Justice's long-standing practice, which we followed, is to defend the statute against that challenge unless there is no reasonable argument that could be made in its defense. *See, e.g.*, The Attorney General's Duty to Defend the Constitutionality of Statutes, 43 Op. Atty. Gen. 325 (1981) (Opinion of Attorney General Smith); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Atty. Gen. 275 (1980) (Opinion of Attorney General Civiletti).[1]

Under that standard, looking at the question now, it seems to me that § 3501 is easily defensible. The Fifth Amendment's text prohibits only compelled testimony. Thus, it is hard to see how it could possible require the exclusion of voluntary custodial confessions, which are the only kind that § 3501 makes admissible. While the Supreme Court did hold in *Miranda* that a confession obtained from a suspect in police custody without certain procedural safeguards could not be admitted whether or not it was voluntary, the Congress is free to modify that rule by statute unless the rule is constitutionally

[1] The Department has generally recognized one limited exception to this rule, pursuant to which it also generally will not defend statutes that it believes unconstitutionally trench on the executive branch's power, even if there is a reasonable argument that could be made in favor of the statute. *See* Civiletti opinion cited above. That exception plainly has no application in the case of § 3501, which attempts to restore, rather than contact, executive power.

required.[2] On the basis of the cases cited in the briefs I referred to above, it seems fairly clear that the Court does not view *Miranda's* exclusionary rule as a constitutional requirement. To be sure, the Supreme Court has never ruled directly on the statute's constitutionality, but the provision seems perfectly consistent with doctrinal developments since *Miranda*, and those developments seem difficult if not impossible to square with any theory under which the provision could found unconstitutional. Finally, two courts of appeals have upheld § 3501's constitutionality and none has struck it down. In fact, my personal view is that since *Miranda's* exclusionary rule was not a constitutional directive, it is not only reasonable but legally correct to say, as the Court of Appeals ruled in *Dickerson*, that § 3501 is a legitimate exercise of

[2] *See* for example, Act of September 2, 1957, 71 Stat. 595 (codified at 18 U.S.C. § 3500) ("Jencks" Act) (making non-discoverable certain material that would have been discoverable by the defense under the rule set out in *Jencks v. United States*, 353 U.S. 657 (1957) (upheld as a proper exercise of Congressional power in *Palermo v. United States*, 360 U.S. 343 (1959)).

It is perhaps worth noting that the *Palermo* court described the Jencks Act as "governing the production of statements to government agents by government witnesses," 360 U.S. at 345, and as "the rule of law governing the production of the statement at issue in this case," 360 U.S. at 351. This language is strikingly similar to that used in Justice O'Connor's majority opinion in *Davis v. United States*, 512 U.S. 451 (1994), where she noted the government's failure in arguing for the admission of incriminating statements made by a defendant in police custody "to rely . . . on 18 U.S.C. § 3501, 'the statute governing the admissibility of confessions in federal prosecutions,' *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351, 128 L.Ed.2d 349, 114 S.Ct. 1599 (1994)." *Davis*, 512 U.S. at 457 n*.

the legislative authority to deal with questions of admissibility of evidence. I should add that although I have given this question fairly careful thought, I may be wrong and the Supreme Court may disagree. I do, however, find it hard to believe that a position that two courts of appeals have backed and that I believe is correct, could not only be wrong, but could be so unreasonable that the Department of Justice would not have an obligation to advance it in defense of an enactment of Congress.

Sincerely,

/s/ Dick Thornburgh
Dick Thornburgh

EDWIN MEESE III

214 MASSACHUSETTS AVENUE, N.E.
SEVENTH FLOOR
WASHINGTON, D.C. 20002

May 12, 1999

The Honorable Strom Thurmond
Chairman
Subcommittee on Criminal Justice Oversight
United States Senate
Washington, DC 20515

Dear Mr. Chairman:

This letter responds to your questions concerning various aspects of the Department of Justice's views and positions on 18 U.S.C. § 3501 during the Administration of President Ronald Reagan. Let me provide you with a brief description of the various decisions that we made in the Department of Justice concerning the statute and then I will answer your specific questions.

After an exhaustive review of the question during my tenure as Attorney General, the Department of Justice's Office of Legal Policy concluded that the rigid exclusionary rule of *Miranda v. Arizona* was not constitutionally mandated, and that if the question were presented to it, the Supreme Court would likely agree with this conclusion. We published this study under the Department's auspices, as the conclusion of the Department of Justice on the question.

In this same study, we concluded that 18 U.S.C. § 3501 was constitutional, and that admission of voluntary confessions pursuant to its provisions was accordingly a legitimate objective for the Department to seek.

I also asked Associate Deputy Attorney General Paul Cassell to direct a search for the right case to use as a vehicle for testing the statute's constitutionality in the Supreme Court. Consequently, Department attorneys proposed a Fifth Circuit case for consideration that the Solicitor General argued was not a good one to use as a test. I decided against seeking to invoke the statute in that case, because we would have been raising the argument for the first time in a petition for rehearing en banc of a panel decision by the court. That is my recollection of the decision I made at the meeting during the spring of 1987 referred to in Charles Fried's book, *Order & Law*, at pp. 45-47.

We continued to monitor cases, and the Department did in fact argue for admission of statements pursuant to the statute in at least one later case of which I am aware. *United States v. Goudreau*. This was in a brief filed in the Eighth Circuit on October 20, 1987, several months after the meeting Professor Fried described. In that case a police officer with the Bureau of Indian Affairs was investigated and subsequently indicted for using excessive force during an arrest. He gave his version of events during an interview at the Law Enforcement Services Building on the reservation, which he attended at his supervisor's instructions. The district court suppressed his statements, finding that he should have received *Miranda* warnings before the interview. The government took an interlocutory appeal. The Department's principal argument to the Eighth Circuit was that the officer was not in custody at the time he made the statements, and therefore *Miranda* warnings were unnecessary. But we also made the alternative argument that the statements

were admissible under § 3501 regardless of whether the officer should have been given the warnings, because the officer had made the statements voluntarily. The Eighth Circuit did not reach our second argument, because it decided the statements were admissible as a result of the first argument.

I should add that during my tenure as Attorney General, so far as I am aware, neither I nor anyone else at the Department of Justice ever directed anyone in a United States Attorney's Office not to make an argument based on § 3501. Nor did we ever pull back a brief in which such an argument had been made.[1]

Thus, our position on *Miranda* was: (1) that none of *Miranda's* procedural requirements, including its exclusionary rule, is constitutionally required (and, I should add, I believe this was the position of every other prior Administration other than that of Presidents Lyndon Johnson); (2) that 18 U.S.C. § 3501 was constitutional; (3) that the Department could appropriately invoke § 3501 in the lower federal courts to seek the admission of voluntary but unMirandized statements, and in fact we did so in at least one case of which I am aware; and (4) that not only were there reasonable arguments the Department

---

[1] The only decision that I made against the use of § 3501 was in the Fifth Circuit case mentioned above, where the decision was consistent with a United States Attorney's office's own reservations about invoking the section given the posture of the case. In that case, my decision was not the result of doubts about the statute's constitutionality, but the fact that the consensus in the Department was that several features made that case a poor vehicle for testing the statute's constitutionality.

could make in defense of § 3501 (the standard the Department has historically applied in considering whether to defend a federal statute), but that those arguments were correct, and that the Department should defend § 3501 against constitutional challenge throughout the federal court system. To the extent Department officials have said anything to the contrary, I would respectfully suggest that they are mistaken.

Because I share your concern about the current Administration's refusal to defend the constitutionality of section 3501, I commend you for holding an oversight hearing to explore this important issue. Thank you for this opportunity to share my views.

Sincerely,

/s/ Ed
Edwin Meese III

Mar 9 2000

Supreme Court, U.S.
FILED
MAR 9 2000
CLERK

No. 99-5525

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF ARIZONA VOICES FOR VICTIMS, CRIME VICTIMS UNITED, OREGON, PENNSYLVANIA COALITION AGAINST RAPE AS *AMICI CURIAE* URGING AFFIRMANCE

DOUGLAS BELOOF
Associate Professor
(*Counsel of Record*)
Director, Crime Victim
Law Institute
Northwestern School of Law of
Lewis & Clark College
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768-6749

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. Miranda Imposes Substantial and Unacceptable Costs on Crime Victims 3

1. The Cost of Re-Victimization 4

2. The Cost of Future Victimization 7

B. Miranda's Cost/Benefit Analysis is Outdated and Flawed 8

1. Miranda Failed to Give Appropriate Weight to the Interest of Crime Victims 8

2. Miranda's Cost/Benefit Analysis Is Inconsistent with Currently Accepted Views of Victims' Interests 10

3. Limiting Miranda's Sweeping Scope Will Enhance Public Confidence in the Criminal Justice System 13

4. Post-Miranda Empirical Evidence Establishes the Magnitude of Harm to Victims and Law Enforcement 14

a. The "Before and After" Studies 15

b. First-Hand Police Reports About Miranda 16

c. Declining Crime Clearance Rates 19

d. Miranda's Effect on Crime Rates 20

TABLE OF CONTENTS – Continued

Page

C. The Constitution's Federalism Limits Support Federal and State Legislative Remedial Schemes That Protect Victims' Interests 21

1. This Court's Remedial Powers Cannot be Greater than Congress's..... 23

2. Miranda Lacks an Adequate Record of Widespread and Persistent Constitutional Violations 25

3. Miranda's Remedial Scheme Lacks Congruence..... 27

4. Miranda's Remedial Scheme Lacks Proportionality 28

D. Section 3501 Appropriately Excludes Involuntary Confessions 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

U.S. CONST., Am. XIV, Sec. 5 .....23, 24

UNITED STATES SUPREME COURT CASES

Board of Educ. v. Dowell, 498 U.S. 237 (1991)..... 22

Calderon v. Thompson, 523 U.S. 538 (1998)..... 5, 6, 12

City of Boerne v. Flores, 521 U.S. 507 (1997) .. 23, 24, 25, 27

Davis v. United States, 512 U.S. 452 (1994) 4, 8

Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank, ___U.S.___, 119 S.Ct. 2199 (1999).....24, 25, 28

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 21

Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S.Ct. 631 (2000).....23, 24, 25, 27, 28

Lewis v. Casey, 518 U.S. 343 (1996) 21

Michigan v. Tucker, 417 U.S. 433 (1974) 4

Milliken v. Bradley, 418 U.S. 717 (1974) 22

Milliken v. Bradley, 433 U.S. 267 (1977) 22

Minnick v. Mississippi, 498 U.S. 146 (1990) 18

Miranda v. Arizona, 384 U.S. 436 (1966)..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986)..... 8

Morris v. Slappy, 461 U.S. 1 (1983)..... 3, 6, 12

Oregon v. Elstad, 470 U.S. 298 (1985) 4, 9

Oregon v. Mitchell, 400 U.S. 112 (1970)..... 23

TABLE OF AUTHORITIES – Continued

Page

Payne v. Tennessee, 501 U.S. 808 (1991)..... 12

Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833 (1992) 22

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 8

Printz v. United States, 521 U.S. 898 (1997)..... 21

Rhode Island v. Innis, 446 U.S. 291 (1980) 14

Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) 4

Smith v. Robbins, ___U.S.___, 120 S.Ct. 746 (2000) ..29, 30

South Carolina v. Gathers, 490 U.S. 821 (1989) 12

South Carolina v. Katzenbach, 383 U.S. 301 (1966)..... 27

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 22

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180 (1997) 22

United States v. Gainey, 380 U.S. 63 (1965) 22

United States v. Lopez, 115 S.Ct. 1624 (1995)..... 21

Withrow v. Williams, 507 U.S. 689 (1993) 3

Younger v. Harris, 401 U.S. 37 (1971)..... 21

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

18 U.S.C. § 3501 .....2, 3, 13, 30

42 U.S.C. § 10606 (1994) 10

CONGRESSIONAL HEARINGS

Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. On the Judiciary, 90th Cong., 1st Sess. 1120 (1967) 15

FEDERAL AGENCY PUBLICATIONS

U.S. JUSTICE DEP'T., BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998 ...7, 13

U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1993 7

U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES 1996..... 7

U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES 1991 7

U.S. DEP'T. OF JUSTICE, OFFICE OF LEGAL POLICY REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986) (*reprinted in* 22 MICH. J.L. REF. 437 (1989))..... 14, 28

STATE CONSTITUTIONS

ALA. CONST. amend. 557..... 10

ALASKA CONST. art. I, § 24..... 10

ARIZ. CONST. art. II, § 2.1..... 10

TABLE OF AUTHORITIES – Continued

Page

CAL. CONST. art. I, § 28 10
COLO. CONST. art. II, § 16a 10
CONN. CONST. art. I, § 8(b) 10
FLA. CONST. art. I, § 16b 10
IDAHO CONST. art. I, § 22 10
ILL. CONST. art. I, § 8.1 10
IND. CONST. art. I, § 13(b) 10
KAN. CONST. art. XV, § 15 10
LA. CONST. art. I, § 25 10
MD. CONST. art. XCVII 10
MICH. CONST. art. I, § 24 10
MISS. CONST. art. III, § 26A 10
MO. CONST. art. I, § 32 10
N.C. CONST. art. I, § 37 10
N.J. CONST. art. I, § 22 10
N.M. CONST. art. II, § 24 10
NEB. CONST. art. I, § 28 10
NEV. CONST. art. I, § 8(2) 10
OHIO CONST. art. I, § 10a 10
OKLA. CONST. art. II, § 34 10
OR. CONST. art. I, § 43 10
R.I. CONST. art. I, § 23 10

TABLE OF AUTHORITIES – Continued

Page

S.C. CONST. art. I, § 24 10
TEX. CONST. art. I, § 30 10
UTAH CONST. art. I, § 28 10
VA. CONST. art. I, § 8A 10
WASH. CONST. art. I, § 35 10
WIS. CONST. art. I, § 9 10

STATE STATUTES

ALA. CODE §§ 15-23-60 to -84 (1995) 10
ALASKA STAT. § 12.61.010 (Lexis 1998) 10
ARIZ. REV. STAT. ANN. §§ 13-4401 to -4439 (West Supp. 1998) 10
ARK. CODE ANN. §§ 16-90-1101 to -1115 (Michie Supp. 1997) 10
CAL. PENAL CODE §§ 679, 1102.6 (West 1999 & Supp. 1999) 11
COLO. REV. STAT. § 24-4.1-302.5 (1998) 11
CONN. GEN. STAT. ANN. § 54-203 (West Supp. 1999) 11
DEL. CODE ANN. §§ 11-9401 to -9419 (1995 & Supp. 1998) 11
FLA. STAT. ANN. § 960.001 (West Supp. 1999) 11
GA. CODE ANN. §§ 17-17-1 to -15 (Michie 1997 & Supp. 1998) 11
HAW. REV. STAT. ANN. § 801D-1 (Lexis 1999) 11
IDAHO CODE § 19-5306 (Michie Supp. 1998) 11

TABLE OF AUTHORITIES – Continued

Page

725 Ill. Comp. Stat. Ann. 120/2 (West 1992) 11

Ind. Code Ann. § 33-14-10-3 (Lexis 1998) 11

Iowa Code Ann. §§ 915.1-.100 (West Supp. 1999) 11

Kan. Stat. Ann. § 74-7333 (Supp. 1998) 11

Ky. Rev. Stat. Ann. § 421.500 (Lexis 1998) 11

La. Rev. Stat. Ann. § 46:1842 (West Supp. 1998) 11

Mass. Ann. Laws ch. 258B, §§ 1-13 (Lexis 1992 & Supp. 1998) 11

Md. Code Ann. § 27-760 (Lexis Supp. 1998) 11

Me. Rev. Stat. Ann. tit. 15, § 6101 (West Supp. 1998) 11

Mich. Comp. Law Ann. §§ 28.1287(751)-(911) (Lexis 1996 & Supp. 1999) 11

Minn. Stat. Ann. §§ 611A.01-.78 (West 1987 & Supp. 1999) 11

Miss. Code Ann. §§ 99-43-1 to -49 (Supp. 1998) 11

Mo. Ann. Stat. § 595.209 (West Supp. 1999) 11

Mont. Code Ann. §§ 46-24-101 to -213 (1997) 11

N.C. Gen. Stat. § 15A-825 (1997) 11

N.D. Cent. Code § 12.1-34-02 (1997) 11

N.H. Rev. Stat. Ann. § 21-M:8-k (Lexis Supp. 1998) 11

N.J. Stat. Ann. § 52:4B-36 (West Supp. 1999) 11

N.M. Stat. Ann. § 31-26-2 (Michie 1994) 11

TABLE OF AUTHORITIES – Continued

Page

N.Y. Exec. Law §§ 640-649 (McKinney 1996) 11

Neb. Rev. Stat. Ann. §§ 81-1848 to -1850 (Michie 1995) 11

Nev. Rev. Stat. Ann. §§ 178.569-.5698 (Michie 1997 & Supp. 1997) 11

Ohio Rev. Code Ann. § 2930.01 (Anderson 1996) 11

Okla. Stat. Ann. tit. 19 § 215.33 (West Supp. 1999) 11

Or. Rev. Stat. § 147.410 (1991) 11

R.I. Gen. Laws § 12-28-2 (1994) 11

S.C. Code Ann. §§ 16-3-1110, -1505 (West Supp. 1998) 11

S.D. Codified Laws §§ 23A-28C-1 to -5 (Lexis 1998) 11

Tenn. Code Ann. § 40-12-104 29

Tenn. Code Ann. § 40-38-102 (Michie 1997) 11

Tex. Crim. P. Code Ann. §§ 56.01, .09 (West Supp. 1999) 11

Utah Code Ann. § 77-37-1 (1995) 11

Va. Code Ann. § 19.2-11.01 (Michie Supp. 1998) 11

Vt. Stat. Ann. tit. 13, § 5303 (1998) 11

W. Va. Code § 61-11A-1 (1992) 11

Wash. Rev. Code Ann. §§ 7.69.010, .030 (West 1992 & Supp. 1999) 11

Wis. Stat. Ann. § 950.01 (West 1996) 11

Wyo. Stat. Ann. § 1-40-203 (Michie 1997) 11

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Commonwealth v. Benz, 585 A.2d 764 (Pa. 1989) 29

State ex rel. Miller v. Smith, 382 S.E. 500 (W.Va. 1981) 29

State of Wisconsin v. Unnamed Defendant, 150 Wis. 2d 352, 441 N.W.2d 696 (1989) 29

OTHER AUTHORITIES

Books

DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE (1999) 11, 29

NATIONAL VICTIM CENTER, THE 1996 VICTIM'S RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS RIGHTS LAWS (1996) 6, 11

HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) 10

CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS (1995 Supp.) 18

ARTICLES & STUDIES

A. Atkins & Paul H. Rubin, The Effects of Criminal Procedure on Crime Rates, Social Science Research Network Electronic Library, <http://papers.ssrn.com/paper.taf?ABSTRAT_ID=140992> 20

American Bar Assoc. Comm. On Justice in a Free Society, Criminal Justice in Crisis (1998) 17

TABLE OF AUTHORITIES – Continued

Page

Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 ..... 10, 12, 14, 29

Craig M. Bradley, *The Failure of the Criminal Procedure Revolution* (1993) 18

Gerald M. Caplan, Miranda *Revisited*, 93 YALE L.J. 1375 (1984) 8

Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U.L. REV. 1084 (1996) 16, 17, 18

Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996) ...15, 16

Paul G. Cassell, Miranda's "Negligible" Effects on Law Enforcement: Some Skeptical Observations, 20 HARV. J. L. PUB. POL'Y 327 (1997) 16

Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda: *Coincidence Or Consequence*, 50 STAN. L. REV. 1181 (1998) 20

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) 20

Paul G. Cassell & Bret S. Hayman, *Police Interrogation: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871 (1996) 18, 19

TABLE OF AUTHORITIES – Continued

Page

John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) 20

Floyd Feeney et al., *Arrests Without Conviction: How Often They Occur and Why* (1983) 19

Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998) 23

Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999) 24

Gary D. Lafree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289 (1985) 19

Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1966) 19

Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967) 15, 17

Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-*Miranda *Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425 16

Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987) 19

Stephen Schulhofer, Miranda's *Practice Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500 (1996) 16

TABLE OF AUTHORITIES – Continued

Page

Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh – A Statistical Study*, 29 U. PITT. L. REV. 1 (1967) 15

Otis H. Stephens *et al.*, *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 TENN. L. REV. 407 (1972) 17

George S. Thomas III, *"Plain Talk About the* Miranda *Empirical Debate: A 'Steady-State' Theory of Confessions,"* 43 UCLA L. REV. 933 (1996) 18

James W. Witt, *Noncoercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973) 17

Gary L. Wolfstone, Miranda – *A Survey of Its Impact*, 7 PROSECUTOR 26 (1971) 17

MISCELLANEOUS

Brief of the United States 5, 23

National Center for Victims, CHART, Victims' Rights State Constitutional Amendments: A Numerical Overview of Elections (1999) 13

INTEREST OF THE *AMICI CURIAE**

Arizona Voices for Victims (AVV) is a non-profit organization dedicated to ensuring that crime victims receive their rights to justice, due process and dignified treatment throughout the criminal justice process. To this end, AVV has five areas of activity: educational programs; crisis response training programs; legal representation and referral programs; judicial accountability program; and data research project.

Crime Victims United, Oregon, (CVU) is a private non-profit organization dedicated to promoting respect and dignity for crime victims in the criminal process. CVU has been a force for change for victims in criminal procedure since 1980 enacting state constitutional crime victim's rights and laws in Oregon.

The Pennsylvania Coalition Against Rape (PCAR) is a non-profit organization established in 1975 to provide services to all victims of sexual violence. PCAR includes an administrative office in central Pennsylvania and a network of 52 regional centers that provide services in every county in Pennsylvania.

SUMMARY OF ARGUMENT

In the last thirty-five (35) years, there have been dramatic and pivotal changes to the fundamental building blocks underlying the *Miranda* decision. These changes inexorably lead to the conclusion that *Miranda's* strict exclusionary rule needs revision.

Since *Miranda* was handed down, the law has changed dramatically to acknowledge the compelling interests of crime victims in the criminal justice process. State constitutions, state and federal statutes, and court

---

* *Amici Curiae* files this brief with consent of both parties. No counsel for any party authored in whole or in part. No one other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

opinions (including the opinions of this Court) now recognize the vital role of crime victims. It is now well-accepted that crime victims have an interest in ensuring that their assailants are held accountable for their criminal behavior. Strict application of *Miranda's* exclusionary rule, however, does not comport with an enlightened criminal justice system that ensures justice for both the criminal and the victim. The *Miranda* Court failed to take into account these vital interests when it established its strict exclusionary rule. Subsequent empirical evidence establishes that the *Miranda* Court clearly mis-gauged the costs and benefits of its prophylactic scheme. This empirical evidence reveals that the human costs of *Miranda* far outweigh its benefits. *Miranda's* sweeping scope is also inconsistent with this Court's recent opinions concerning the Constitution's federalism limits. This Court has established clear boundaries for federal government remedial schemes that prohibit otherwise lawful behavior by the States. This constitutional law evolution concerning federal remedial schemes calls for modification of the *Miranda* exclusionary rule.

Any of these substantial changes taken alone is sufficient for this Court to revisit *Miranda*. When viewed together, these changes compel the conclusion that the *Miranda* prophylactic remedial scheme should no longer be imposed on the States. Likewise, this Court should uphold 18 U.S.C. § 3501 as appropriate federal legislation that ensures voluntary statements without needlessly harming the interests of crime victims.

ARGUMENT

Since *Miranda v. Arizona*, 384 U.S. 436 (1966), was handed down, there have been substantial societal and legal changes that support reconsideration of *Miranda's* inflexible exclusionary rule. The law has changed dramatically to acknowledge the compelling interests of crime victims in the criminal justice process. The *Miranda* Court failed to consider the crime victim's vital interest in

ensuring that a criminal defendant is held accountable for his crimes and in limiting the needless harm a victim suffers when an assailant is freed for technical reasons. In addition, information obtained post-*Miranda* shows that the *Miranda* Court mis-gauged the adverse consequences of such a sweeping prophylactic scheme. For these reasons, States and Congress should be free to implement other schemes that ensure voluntary statements without allowing the criminal justice system to inflict needless harm on crime victims.

18 U.S.C. § 3501 insures that voluntary confessions are admitted in evidence, thus preventing the possible escape from justice of confessed, dangerous criminals. This is of particular concern to crime victims, who have a legitimate interest not only in avoiding depredations at the hands of criminals but also, more fundamentally, in seeing reliable evidence admitted in criminal trials.

A. Miranda Imposes Substantial and Unacceptable Costs on Crime Victims.

This Court has instructed that "[i]n the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). This does not mean, of course, that the interests of victims can serve to excuse violating the constitutional rights of criminal defendants. *See id.* at 14. This case, however, presents no question of a defendant's "constitutional" rights. Petitioner Dickerson's incriminating statements were voluntary. Thus, the only issue before the Court concerns suppression of an admittedly voluntary statement because of a deviation from *Miranda's* prophylactic rule.[1]

---

[1] Police deviations from *Miranda* are not violations of the Constitution. *Miranda* rights are "not themselves protected by the Constitution" and are "not constitutional in character." *Withrow v. Williams*, 507 U.S. 689, 690-91 (1993). Instead, a

1. The Cost of Re-Victimization.

Miranda's exclusionary rule is particularly pernicious from the perspective of crime victims. *Miranda* excludes an unwarned statement from trial even when it is clearly voluntary. Such a requirement is especially harmful in cases where the voluntary statement can be essential evidence of guilt. In such cases, *Miranda* frees a guilty offender simply because the police mistakenly failed to abide by *Miranda's* prophylactic requirements.

Crime victims expect that the criminal justice system will accurately and fairly determine whether an offender is guilty of the crime. They hope that this system will impose a prompt and just punishment on the convicted criminal. When, however, the criminal justice system strays from this fundamental mission – and allows factually guilty criminals to escape punishment for technical reasons – it deprives crime victims of the justice that they rightfully believe they are due. *See Richmond Newspapers v. Virginia*, 448 U.S. 571 (1980) (plurality opinion) ("Civilized societies withdraw from both the victim and the vigilante the enforcement of criminal laws, but they cannot erase from peoples consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution."). *Miranda* thus conveys the unfortunate message that a victim's need for justice, or even urge for retribution, through legitimate means, are less worthy than the technical rules protecting the suspect. And in the process, the technical rules re-victimize them by devaluing the criminal act and denying dignity and respect to the victim's harm.

---

deviation from *Miranda* is merely a deviation from court-created "prophylactic" rules set forth as "a series of recommended procedural safeguards." *Davis v. United States*, 512 U.S. 452, 457-58 (1994) (*quoting Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)). "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Oregon v. Elstad*, 470 U.S. 298, 306 n.1 (1985).

In recognizing re-victimization resulting from *Miranda* the Department of Justice has explained:

> *Miranda's* rules are completely rigid and formal, in the sense that no showing, however strong, that a suspect's statements were freely given and truthful is deemed sufficient to excuse non-compliance. Cases accordingly arise in which perpetrators of the most serious crimes secure the exclusion of their admissions or the reversal of their convictions on the basis of technical violation of *Miranda* or related decisions that do not cast the slightest doubt on their guilt. This can result in the freeing of known criminals or the prolongation of the anguish of crime victims through years of additional litigation. The perception of such cases by members of the public must be that the system has become deranged, treating their lives, their security and their deepest sensibilities as pawns in an inscrutable game.

U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), *reprinted in* 33 MICH. J.L. REFORM. 437, 545 (1989). *See also*, Brief of the United States at 50. ("There is no doubt that the public pays a heavy price if technical violations of *Miranda* result in suppression of otherwise probative evidence and non-prosecution of acquittal of felons ensues.")

In recent cases, this Court has demonstrated a sensitivity to the trauma the criminal justice system can inflict on crime victims. In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court acknowledged that re-victimization occurs when the criminal justice process fails to punish the guilty. This Court stated:

> Only with real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing that the moral judgment will be carried out. To

> unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the state and victims of crime alike.

Id. at 550. *See also, Morris v. Slappy*, 461 U.S. 1, 14-15, (1982) (recognizing that the rights of a criminal defendant should not be applied in a manner that unnecessarily harms the crime victim and criticizing the lower court for failing "to take into account the interest of the (rape) victim . . . in not undergoing the ordeal of yet a third trial in the case . . . .").

The victims in the *Calderon* and *Morris* contexts were genuinely distressed by seemingly endless court procedures and delays in the justice process. While delayed justice is unacceptable, the complete denial of justice – because the guilty offender was not tried or convicted – traumatizes victims even more. Not only does the process itself lack concern about victim harm, it can also deprive the victim of a sense of personal security that comes from knowing that the assailant is imprisoned and unable to hurt them again.[2] Likewise, the victims are deprived of sentencing alternatives – such as restitution or restorative justice – that are designed to compensate victims or encourage remorse by the offender.

---

[2] Victims' concern about re-victimization by same offender has prompted many states to enact legislation requiring *notice* to the victim whenever the offender is released from pretrial detention or prison. NATIONAL VICTIM CENTER, THE 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIM'S RIGHTS LAWS, Table 3-B, (Listing 35 states providing notice of pretrial release and 40 states providing notice of final release from prison as of 1995). Likewise, victims are often granted the specific right to *be heard* in opposition to pretrial or prison release. *See id.*, Tables 9A and 9B.

2. The Cost of Future Victimization.

The loss of reliable confessions results in additional crime victims, who are victimized by released suspects who are factually guilty. Twenty-three percent of victims reported crime to prevent further crimes by the offender against themselves or third persons. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, 189, TABLE 3.31.

There are no available statistics for recidivism by suspects released pursuant to *Miranda*. However, there is high probability that a person committing a serious offense and released will offend again. Department of Justice studies establish:

(1) One in three violent offenders released from prison were rearrested within 3 years for another violent crime. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983, 2.

(2) Of the 108,580 persons released from prisons in 11 states in 1983, 68,000 were rearrested and charged with more than 326,000 new felonies and serious misdemeanors, including approximately 50,000 violent offenses. *Id.*, at 1.

(3) In 1996, recidivists accounted for 59% of jail inmates. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 1996, 6.

(4) Approximately twelve percent of all prison inmates were violent recidivists who were presently incarcerated for a violent offense *and* had committed a violent offense in the past. *Id.*, 6, Table 8.

(5) Among prison inmates previously incarcerated, 91% had been in jail or prison for another offense within 5 years before their current offense. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991, 11.

Clearly, release of an offender due to the operation of *Miranda* results in a high probability that there will be future victimization. Although shocking, statistics fail to adequately convey the tremendous human cost involved in "the acquittal and the nonprosecution of . . . dangerous felons [which] enables them to continue their depredations upon our citizens." *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring). *See also* Gerald M. Caplan, *Miranda Revisited*, 93 YALE L.J. 1375, 1384-85 (1984) (Statistical studies "reduce crime to something remote and abstract, a string of numbers, an event that one reads about in the newspapers, something that happens in another part of town. There is no hint of rape as a nightmare come alive, or robbery as a ruinous matter.").

B. Miranda's Cost/Benefit Analysis is Outdated and Flawed.

In the realm of court-created safeguards rather than constitutional rights, the interests of crime victims must be considered. The *Miranda* regime rests on a cost/benefit calculation that evaluates competing concerns. *See Moran v. Burbine*, 475 U.S. 412, 434 n.4 (1986) (describing *Miranda* rules as "a carefully crafted balance designed to fully protect *both* the defendant's and society's interests. . . . "). Today, this cost/benefit analysis necessarily requires consideration of the interests of crime victims. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984) (recognizing that "society's interests" include the interests of victims, since both "the victims and the community" have an interest "in knowing that offenders are being brought to account for their criminal conduct").

1. Miranda Failed to Give Appropriate Weight to the Interest of Crime Victims.

The *Miranda* decision itself reflects an outdated and inadequate understanding for the interests of crime victims in the criminal justice process. Victims were absent from the development of *Miranda* doctrine. Crime victims

make no substantive appearance in the *Miranda* majority opinion itself.

The *Miranda* rule gave little room for consideration of victims. For example, the Court announced that it would "not *pause* to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468 (emphasis added). In announcing its unwillingness to investigate actual knowledge of rights, the Court turned a blind eye to the vital interests of victims in having such a determination.

Even the dissenting opinion of Justice White in *Miranda* fell short of a modern assessment of victim harm caused by the criminal process. In accurately predicting the increased future victimization of citizens as a natural result of the *Miranda* exclusionary rule, the dissent urged, "there will be not be a gain, but a loss in human dignity." 384 U.S. at 542. This observation remains true today. But Justice White's assessment of harm to human dignity (because of future crime caused by suspects released because of *Miranda* exclusions), did not acknowledge the re-victimization of initial victims caused by the technical rules that jeopardize the truth-determining process. Thus, *Miranda* imposes substantial and unacceptable costs on both the initial victim (whose cases become unprosecuteable because of exclusion of statements) and future victims (who are harmed by criminals released because of *Miranda*). These costs were not given appropriate consideration by the *Miranda* Court.

In later opinions, the Court has not substantially altered the one-sided balance struck in *Miranda*. The basic *Miranda* rules have remained in place, and to this day the *Miranda* doctrine does not "pause" to consider the individual circumstances of the case. Indeed, the Court has later described the *Miranda* presumption as "irrebuttable," *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), meaning that the interests of crime victims in proving that confession was truly voluntary cannot ever be taken in account.

2. Miranda's Cost/Benefit Analysis Is Inconsistent with Currently Accepted Views of Victims' Interests.

Since the 1966 *Miranda* decision reached its one-sided assessment, there has been a revolutionary change in the legal recognition of crime victim's interests. At the time of *Miranda*, the criminal justice process was generally conceived of as a contest between two competing interests: those of the state in efficient prosecution and those of the defendant in fair adjudication. Perhaps the most significant theoretical description of the process was Professor Herbert Packer's identification of this two value system in the criminal justice process: the "Crime Control Model" and the "Due Process Model." *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-53 (1968).

Today there is a growing recognition that the two models are outdated and that they must be supplemented by a third model of criminal process that recognizes crime victims. *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289. Since *Miranda*, thirty-two states have chiseled victims' rights into their respective constitutions.[3] The

---

[3] *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16b; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. CONST. art. XCVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8(2); N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art I, § 30; UTAH CONST. art I, § 28; VA. CONST. art. I, § 8A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m; 42 U.S.C. § 10606 (1994); ALA. CODE §§ 15-23-60 to -84 (1995); ALASKA STAT. § 12.61.010 (Lexis 1998); ARIZ. REV. STAT. ANN. §§ 13-4401 to -4439 (West Supp. 1998); ARK. CODE ANN. §§ 16-90-1101 to -1115 (Michie

federal government and all the States have enacted numerous statutory protections for victims' interests.[4]

Supp. 1997); CAL. PENAL CODE §§ 679, 1102.6 (West 1999 & Supp. 1999); COLO. REV. STAT. § 24-4.1-302.5 (1998); CONN. GEN. STAT. ANN. § 54-203 (West Supp. 1999); DEL. CODE ANN. §§ 11-9401 to -9419 (1995 & Supp. 1998); FLA. STAT. ANN. § 960.001 (West Supp. 1999); GA. CODE ANN. §§ 17-17-1 to -15 (Michie 1997 & Supp. 1998); HAW. REV. STAT. ANN. § 801D-1 (Lexis 1999); IDAHO CODE § 19-5306 (Michie Supp. 1998); 725 ILL. COMP. STAT. ANN. 120/2 (West 1992); IND. CODE ANN. § 33-14-10-3 (Lexis 1998); IOWA CODE ANN. §§ 915.1-.100 (West Supp. 1999); KAN. STAT. ANN. § 74-7333 (Supp. 1998); KY. REV. STAT. ANN. § 421.500 (Lexis 1998); LA. REV. STAT. ANN. § 46:1842 (West Supp. 1998); ME. REV. STAT. ANN. tit. 15, § 6101 (West Supp. 1998); MD. CODE ANN. § 27-760 (Lexis Supp. 1998); MASS. ANN. LAWS ch. 258B, §§ 1-13 (Lexis 1992 & Supp. 1998); MICH. COMP. LAW ANN. §§ 28.1287(751)-(911) (Lexis 1996 & Supp. 1999); MINN. STAT. ANN. §§ 611A.01-.78 (West 1987 & Supp. 1999); MISS. CODE ANN. §§ 99-43-1 to -49 (Supp. 1998); MO. ANN. STAT. § 595.209 (West Supp. 1999); MONT. CODE ANN. §§ 46-24-101 to -213 (1997); NEB. REV. STAT. ANN. §§ 81-1848 to -1850 (Michie 1995); NEV. REV. STAT. ANN. §§ 178.569-.5698 (Michie 1997 & Supp. 1997); N.H. REV. STAT. ANN. § 21-M:8-k (Lexis Supp. 1998); N.J. STAT. ANN. § 52:4B-36 (West Supp. 1999); N.M. STAT. ANN. § 31-26-2 (Michie 1994); N.Y. EXEC. LAW §§ 640-649 (McKinney 1996); N.C. GEN. STAT. § 15A-825 (1997); N.D. CENT. CODE § 12.1-34-02 (1997); OHIO REV. CODE ANN. § 2930.01 (Anderson 1996); OKLA. STAT. ANN. tit. 19 § 215.33 (West Supp. 1999); OR. REV. STAT. § 147.410 (1991); R.I. GEN. LAWS § 12-28-2 (1994); S.C. CODE ANN. §§ 16-3-1110, -1505 (West Supp. 1998); S.D. CODIFIED LAWS §§ 23A-28C-1 to -5 (Lexis 1998); TENN. CODE ANN. § 40-38-102 (Michie 1997); TEX. CRIM. P. CODE ANN. §§ 56.01, .09 (West Supp. 1999); UTAH CODE ANN. § 77-37-1 (1995); VT. STAT. ANN. tit. 13, § 5303 (1998); VA. CODE ANN. § 19.2-11.01 (Michie Supp. 1998); WASH. REV. CODE ANN. §§ 7.69.010, .030 (West 1992 & Supp. 1999); W. VA. CODE § 61-11A-1 (1992); WIS. STAT. ANN. § 950.01 (West 1996); WYO. STAT. ANN. § 1-40-203 (Michie 1997).

[4] *Id. See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE *passim* (1999); NATIONAL VICTIM CENTER, THE 1996 VICTIM'S RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS RIGHTS LAWS *passim* (1996).

The recognition of victims' interests across the country encompasses at least three important concepts: fairness to the victim, respect for the victim, and dignity of the victim. For example, at least twenty states have constitutionally protected a crime victim's interest in being treated with dignity and at least eighteen states have constitutionally recognized a victim's interest in being treated fairly. Beloof, *supra*, 1999 UTAH L. REV. at 328-29. *See also Payne v. Tennessee*, 501 U.S. 808, 834 (Scalia, J., concurring) (noting the development of "a public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement"). Victim rights of participation, privacy and protection exist in every procedural stage of the criminal justice process, from the investigative stage through parole hearings.[5]

Since *Miranda*, this Court's opinions, too, have given decidedly greater attention to the interests of crime victims. *See Calderon v. Thompson*, 523 U.S. 538 (1998) (holding that the harm to the victim caused by the criminal justice process had to be considered in evaluating the criminal defendant's constitutional claim); *Payne v. Tennessee*, 501 U.S. 808, 823, 828-30 (1991) (recognizing the victim as a unique individual human being and upholding the use of victim impact testimony in capital sentencing proceedings, recognizing that such testimony "serves entirely legitimate purposes," and rejecting earlier cases that "turn[ed] the victim into a faceless stranger at the penalty phase of a capital trial . . . .") (quoting with approval *South Carolina v. Gathers*, 490 U.S. 821 (1989)) (O'Connor dissenting); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (holding that "[i]n the administration of criminal justice, courts may not ignore the concerns of victims . . . .").

As these opinions plainly demonstrate, close attention to victims' legitimate concerns in the development of rules of criminal procedure is now part and parcel of the judicial process. This significant change in law acknowledging

---

[5] *Id.* n.5, *supra* n.4.

victim harm means that *Miranda's* failure to give even passing attention to victims' interests is anachronistic.

3. Limiting Miranda's Sweeping Scope Will Enhance Public Confidence in the Criminal Justice System.

Contrary to claims of those seeking to invalidate Section 3501, *see e.g.* Brief of United States at 38, a decision which restricts *Miranda* sweeping exclusionary rule will not adversely unsettle public expectations. Public confidence is surely enhanced when crime victims' interests are finally considered. In the modern era, the public expectations are that victim dignity will be weighed in forming criminal procedure.

There is strong public support for crime victim rights and laws. For example, since *Miranda*, all 50 jurisdictions have provided for some procedure for victim impact statements at sentencing. NATIONAL VICTIM CENTER, THE 1996 VICTIM'S RIGHTS SOURCEBOOK: A COMPILATION OF VICTIM'S RIGHTS LAWS, TABLES 9A, 9B. Additionally, the history of electoral support of State Victim's Rights Constitutional Amendments, all passed since 1982, is illustrative of the strong public support of victim interests in the criminal process. In popular referendums the percentage of favorable votes cast was: Al. 80%; Ak. 87%; Az. 58%; Ca. 56%; Co. 86%; Ct. 78%; Fl. 90%; Id. 79%; Ill. 77% ; Ind. 89%; Ks. 84%; La. 69%; Md. 92%; Mi. 84%; Ms 93%; Mo. 84%; Ma. 71%; Neb. 78%; Nv. 74%; N.J. 85%; N. M. 68%; N.C. 78%; Oh. 77%; Ok. 91%; S.C. 89%; Tn. 89%; Tx. 73%; Ut. 68%; Va. 84%; Wa. 78%; Ws. 84%. NATIONAL VICTIM CENTER, CHART, VICTIMS RIGHTS CONSTITUTIONAL AMENDMENTS: A NUMERICAL OVERVIEW OF ELECTIONS (1999). In contrast, the public overall holds a low opinion of the criminal justice system. Thirty-seven percent (37%) of the public has very little or no confidence in the criminal justice process. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, 104, TABLE 2.12.

If anything, the weighing of victims' interests in the Court's reconsideration of *Miranda* will bolster public confidence in the criminal justice system. As stated by the U.S. Justice Department: "*Miranda* is damaging to public confidence in the law, and can result in gross injustices to crime victims." U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986) (*reprinted at* 22 UNIV. MICH. J. L. REFORM 437, 545 (1989)). Because of the popular support of laws recognizing victim dignity, limiting *Miranda's* harsh application based on consideration of victim dignity will be received with public acclaim rather than public derision. It is clear that the public desires consideration of victim interests as part of the legal culture. The deluge of modern victim laws reveals that the public does not accept a criminal justice process that devalues victim dignity. *See* Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, *passim*.

4. Post-Miranda Empirical Evidence Establishes the Magnitude of Harm to Victims and Law Enforcement.

Post-*Miranda* empirical studies now reveal the devastation reaped by the *Miranda* exclusionary rule. The Court in *Miranda* promised that "[o]ur decision is not intended to hamper the traditional function of police officers in investigating crime." *Miranda*, 384 U.S. at 477. In more recent opinions, the Court appears to have proceeded on the premise that the *Miranda* rules have not harmed law enforcement. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("law enforcement practices have adjusted to [*Miranda's*] strictures"). This premise is incorrect. The thirty-five years of experience with *Miranda* has lead to empirical studies that establish that the exclusion of voluntary confessions harms crime victims. Of course, none of this empirical evidence on *Miranda's* effects was available to the Court when it

decided *Miranda*. Nor has any of it previously been presented to this Court.

a. The "Before and After" Studies.

In the immediate wake of *Miranda*, researchers conducted a series of studies to measure the effects of the decision. The great bulk of these studies clearly demonstrated that *Miranda* made it much more difficult for police officers to obtain confessions from suspects.[6] A

---

[6] *See* Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh – A Statistical Study*, 29 U. PITT. L. REV. 1, 12-13 (1967). (finding that Pittsburgh's confession rate for homicide, rape, robbery, burglary and larceny dropped from 49% to 32% following *Miranda*); *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. On the Judiciary*, 90th Cong., 1st Sess. 1120 (1967) (statement of Frank Hogan, District Attorney of New York County) (describing drop in incriminating statements from 49% to 15% following *Miranda*); *Controlling Crime Hearings, supra*, at 200-01 (statement of Arlen Specter, Philadelphia District Attorney) (estimating that before *Miranda* 68% of suspects charged with serious offenses gave police some form of statement and that after *Miranda* only 40.7% gave statements); *Controlling Crime Hearings, supra*, at 223 (statement of Aaron Koota, District Attorney of Kings County New York (Brooklyn)) (describing reduction in statements in serious cases from 90% to 59% following *Miranda*).

Although other studies have concluded that *Miranda* had a negligible effect on confession rates, the empirical data supports the opposite conclusion. *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1573 (1967) (concluding that "not much has changed after *Miranda*" even while acknowledging that "[t]he data suggest a decline of roughly 10 to 15 percent from 1960 to 1966 in the number of people who gave some form of incriminating evidence over the entire time"); Cassell, *supra*, 90 NW. U.L. REV. at 409 (reexamining and reanalyzing same data and concluding that data demonstrated a 16 percentage point reduction in the rate at which admissible confessions were obtained).

comprehensive analysis of all this data indicates that the confession rate declined 16 percentage points after *Miranda*. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U.L. Rev. 387, 395-418 (1996) (noting pre-*Miranda* 50% confession rate declined to 34%).

This reduced confession rate obviously affected the criminal conviction rate, as voluntary statements may be critical proof of guilt. Conservative estimates indicate that *Miranda* "has led to lost cases against almost four percent of all criminal suspects in this country who are questioned." Cassell, *supra*, 90 Nw. U.L. Rev. at 438.[7] This means that roughly 28,000 serious violent criminals and 79,000 property offenders within the crime index and more than 500,000 other criminals outside the crime index go free each year because of *Miranda's* exclusionary rule. *Id.* at 440. Such staggering numbers establish that *Miranda* grossly underestimated the impact of its exclusionary rule.

b. First-Hand Police Reports About Miranda.

In the years immediately following the *Miranda* decision, researchers conducted several surveys of police officers to obtain their first-hand assessment of the effects of *Miranda*. These surveys generally found that police officers reported harmful effects.[8] Overall, these first-hand

---

[7] *Compare* Stephen Schulhofer, *Miranda's Practice Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. Rev. 500 (1996) (disputing cost analysis) *with* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U.L. Rev. 1084 (1996) *and* Paul G. Cassell, *Miranda's "Negligible" Effects on Law Enforcement: Some Skeptical Observations*, 20 Harv. J.L. Pub. Pol'y 327, 330-32 (1997) (identifying fatal flaws in Schulhofer analysis).

[8] *See generally* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U.L. Rev. 1084, 1106-10 (1996); Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-*

accounts from police laboring under the *Miranda* rules provide strong evidence of its adverse impact on law enforcement.

Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L.J. 425, 465 (Table 12) (1966 survey finding that most police and prosecutors thought that the percentage of suspects who refused to make a statement had increased and that the percentage of confession had decreased after police responded to *Escobedo v. Illinois* by warning suspects of their rights); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 Yale L.J. 1519, 1611-12 (1967) (reporting that interview of detectives in New Haven who were involved in interrogations found that they "unanimously believe [*Miranda*] will unjustifiably [help the suspect]" and "would hurt their clearance rate"); Otis H. Stephens *et al., Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 Tenn. L. Rev. 407, 420 (1972). (reporting that virtually all of the officers surveyed in Tennessee and Georgia in 1969 and 1970 believed that Supreme Court decisions had adversely affected their work and most attributed this negative influence first and foremost to *Miranda*). Gary L. Wolfstone, Miranda – *A Survey of Its Impact*, 7 Prosecutor 26, 27 (1971) (survey in 1970 of police chiefs and prosecutors around the country found that most agreed that *Miranda* raised obstacles to law enforcement); James W. Witt, *Noncoercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. Crim. L. & Criminology 320, 325 (1973) (1970 interview of California police officers finding that they "were in almost complete agreement over the effect that the *Miranda* warnings were having on the outputs of formal interrogation. Most believed that they were getting many fewer confessions, admission, and statements."); Cassell, *supra*, 90 Nw. U.L. Rev. at 1108 (discussing an unpublished 1987 telephone survey of the membership of the Police Executive Research Forum found that their members favored "reconsideration of *Miranda* and some modification.").

Contrary survey evidence has been severely criticized. *Compare* American Bar Assoc. Comm. On Criminal Justice in a Free Soc'y, Criminal Justice in Crisis (1988) (contrary survey)

More recent data suggests that *Miranda* suppressed confession rates, even though the *Miranda* Court discounted the possibility of such a result.[9] Although broad generalizations are difficult, the most detailed and careful scholarly estimate is that pre-*Miranda* confession rates in this country were between 55%-60%.[10] After *Miranda*, the available studies reveal decidedly lower confession rates. The most recent and careful empirical study, in 1994 in Salt

---

with Cassell, *supra*, 90 Nw. U.L. Rev. at 1108-10 (questioning bias of ABA survey) *and* Craig M. Bradley, The Failure of the Criminal Procedure Revolution 44 (1993) (study finding that prosecutors generally believe that a "disturbingly high" number of cases are lost due to *Miranda*).

[9] *Miranda* suggests that the suspect's lawyers might be able to monitor police interrogation and that police could therefore provide lawyers and have interrogation proceed. *See e.g.*, 384 U.S. at 470 (discussing the "functions" that "[t]he presence of counsel at the interrogation may serve" and observing that the "lawyer can testify . . . in court" about the interrogation). On this point, experience has shown that the *Miranda* Court was clearly mistaken. Today, if a suspect asks for a lawyer, the police simply stop questioning. Indeed, in later interpretations of *Miranda*, the Court has found it necessary to amplify the prophylactic *Miranda* rules by creating additional layers of prophylaxis to affirmatively *preclude* questioning even after suspects have consulted with a lawyer. *See Minnick v. Mississippi*, 498 U.S. 146, 151-54 (1990).

[10] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839, 871 (1996); *accord* Christopher Slobogin, Criminal Procedure: Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials 6 (1995 Supp.) (concluding that a 64 percent confession rate is "comparable to pre-*Miranda* confession rates"). *Compare* George S. Thomas III, *"Plain Talk About the* Miranda *Empirical Debate: A 'Steady-State' Theory of Confessions,"* 43 UCLA L. Rev. 933, 935-36 (1996) (deriving a lower pre-*Miranda* confession rate) *with* Cassell & Hayman, *supra*, 43 UCLA L. Rev. at 872-76 (rebutting Prof. Thomas' estimate).

Lake County, Utah, found an overall confession rate of only 33 percent. Cassell & Hayman, *Police Interrogation: An Empirical Study of the Effects of Miranda*, 43 UCLA L Rev. 839, 871, 869 (1996). This is substantially below the confession rates reported before *Miranda*, strongly suggesting that confession rates have in no way rebounded. This Salt Lake County data is generally consistent with such other data as is available.[11] Taken together, these studies confirm that confession rates in this country fell after *Miranda*. Cassell & Hayman, *supra*, 43 UCLA L. Rev. at 876 (concluding that *Miranda* depressed confession rates).

c. Declining Crime Clearance Rates.

"Clearance" rates – the rate at which police officers solve or "clear" crimes – have been widely viewed as a statistic that would reveal its effects, particularly by *defenders* of the *Miranda* decision.[12] Contrary to conventional academic wisdom, crime clearance rates fell sharply all over the country immediately after *Miranda* and remained at these lower levels over the next three

---

[11] *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1966) (finding that Berkeley detectives had a 64% in-custody questioning success rate); Cassell & Hayman, *supra*, at 926-30 (translating Leo confession rate to 39%); Floyd Feeney et al., Arrests Without Conviction: How Often They Occur and Why 142 (1983) (noting a Nat'l Inst. of Justice study of Jacksonville and San Diego with respective confession rates of 33% and 20% and overall incriminating statement rate of 51% and 37%); Gary D. Lafree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 Criminology 289, 302 (1985) (1977 study reporting 40% confession rate).

[12] *See e.g.*, Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 436 (1987) (claiming *Miranda* did not harm law enforcement because clearance rates quickly "rebounded" to pre-*Miranda* levels).

decades.[13] The FBI's figures for the national crime clearance rate from 1950 to 1995 for violent crimes (non-negligent homicide, forcible rape, aggravated assault and robbery) show that (1) violent crime clearance rates were fairly stable from 1950 to 1965, (2) fell sharply in the three years immediately after *Miranda*, and (3) have remained about 15 percentage points below the pre-*Miranda* rate. These national reports suggest that *Miranda* substantially harmed crime victims and significantly hampered law enforcement effectiveness and disprove the suggestion that there was any subsequent "rebound" of clearance rates.

d. Miranda's Effect on Crime Rates.

In the wake of the *Miranda* decision, crime rates skyrocketed. A possible link between the decision and crime rates was recently investigated in an elaborate econometric model. After controlling for various possibly confounding factors, the model revealed that *Miranda* was correlated with "an 11% increase in total crimes and a nearly 33% increase in violent crimes." Raymond A. Atkins & Paul H. Rubin, The Effects of Criminal Procedure on Crime Rates, Social Science Research Network Electronic Library, <http://papers.ssrn.com/paper.taf?ABSTRAT___ID=140992> These empirical results further support the conclusion that *Miranda* harmed many crime victims and damaged law enforcement effectiveness.

The modern Court, unlike the *Miranda* Court, possesses reliable empirical studies which measure the

---

[13] Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). *Compare* John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (confirming and questioning various aspects of this analysis) *with* Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence Or Consequence*, 50 STAN. L. REV. 1181 (1998) (answering Prof. Donohue's questions).

impact of *Miranda* exclusion from the various angles of (a) "before and after" studies, (b) first-hand police reports, (c) declining crime clearance rates, and (d) crime rates. This new information reveals the magnitude of harm to individual crime victims and law enforcement efforts caused by *Miranda* and strongly supports the elimination of the *Miranda* exclusionary rule.

C. The Constitution's Federalism Limits Support Federal and State Legislative Remedial Scheme's That Protect Victims' Interests.

There are substantial constitutional limits on federal remedial schemes imposed on the States against their will. The Constitution establishes a system of "dual sovereignty" where the states surrendered enumerated powers to the federal government but retained a "residual and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Tenth Amendment protects those powers that have not been granted to the federal government by reserving those powers to the states. *Printz v. United States*, 521 U.S. at 919; *United States v. Lopez*, 115 S.Ct. 1624, 1631 n.3 (1995).

The Constitution's dual sovereignty system substantially limits the Federal Government's use of remedial schemes that intrude on States or the criminal justice process. There is a "longstanding public policy against federal court interference with state criminal proceedings." *Younger v. Harris*, 401 U.S. 37, 43 (1971). This Court has limited the exercise of judicial remedial power to specific constitutional violations. *Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) (holding that "[c]ourts have no power to presume and remediate harm that has not been established"). This Court has also precluded courts from exercising plenary power to restructure the operation of state and local governmental entities and limited remedial

orders in both time and scope to address specific constitutional violations.[14] *Miranda's* remedial scheme simply does not comply with these well-established limits on judicial remedial authority.

Miranda vividly demonstrates why the courts are ill-suited to create broad public policy. Unlike Congress, this Court has no power to conduct hearings, collect evidence or hear testimony. This Court has frequently recognized that legislatures are "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997); *United States v. Gainey*, 380 U.S. 63, 67 (1965). The Court does not answer to the electorate. More importantly, its guiding principles, such as *stare decisis*, discourage state experimentation with different methods for achieving public policy goals; rather it binds courts to a rule of law that is designed to ensure equal justice through inflexibility.[15]

---

[14] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). *See also Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (providing that inter district school desegregation remedial order was inconsistent with the equitable principle that the scope of the remedy is determined by the nature and extent of the constitutional violation); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."); *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) ("A federal court's regulatory control . . . [should] not extend beyond the time required to remedy the effects of past [Constitutional violations].").

[15] In any event, the factors required for disregard of *Miranda* precedents are more than met here. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the Court set out several factors to be considered in overruling an opinion. All these factors are powerfully

1. This Court's Remedial Powers Cannot be Greater than Congress's.

This Court has recently held that the Constitution's inherent federalism limits preclude Congress from creating substantive rights that intrude on the States. Those same limits apply to the federal courts. The courts may not amend the Constitution absent Art. V and must observe the sovereign character of the states. Thus, the federalism limits imposed on Congressional action set the upper limit on federal judicial prophylactic schemes.

The Fourteenth Amendment grants Congress the power to enforce the provisions of the Fourteenth Amendment by "appropriate legislation." U.S. Const., Am. XIV, Sec. 5. Congress thus may enact legislation for the purpose of remedying or preventing constitutional violations. *Kimel v. Florida Board of Regents*, ___ U.S. ___, 120 S.Ct. 631, 644 (2000). Section 5 authorizes preventative measures "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.' " *City of Boerne v. Flores*, 521 U.S. at 518. While this legislative enforcement power is broad, it is limited by the separation-of-powers and the inherent limits of federalism. *See Boerne*, 521 U.S. at 518; *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970); *see generally* Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 Wm. & Mary L. Rev. 699 (1998).

This Court has made clear that federal remedial legislation enacted pursuant to Section 5 may not create substantive rights that exceed the Fourteenth Amendment's

---

impacted by (A) the change in law which now acknowledges victim harm, (B) the availability of new empirical evidence revealing the magnitude of victim harm resulting from *Miranda*, and (C) the recent clarification of the constitutional propriety of imposing remedial schemes on states. *Compare*, Brief for United States, 29-50 (denying changes in law or fact impacting these factors).

constitutional protections. *Boerne*, 521 U.S. at 518-19 (holding that legislation that "alters the meaning" of a constitutional provision cannot be deemed to "enforce" that provision). In order to prevent the grant of substantive rights under the guise of "remedial" legislation, this Court has established a three-step analysis when reviewing federal legislation that prohibits lawful state conduct. First, the preventative remedial scheme must be based on a clear record of " 'widespread and persistent deprivation of constitutional rights.' " *See College Savings Bank*, 119 S.Ct. 2199 at 2210 (quoting *Boerne*, 521 U.S. at 526). Second, whatever remedy Congress creates must be "congruent" with the constitutional evil identified. *Kimel*, 120 S.Ct. at 635; *College Savings Bank*, 119 S.Ct. 2224; *Boerne*, 521 U.S. 519. *See generally*, Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). Third, the remedy must be "proportional." *Id.*

Certainly, this Court – that has no such explicit grant of remedial power under the Fourteenth Amendment – cannot have remedial powers that exceed Congress's. The Constitution does not permit the federal government to create new constitutional rights unless it complies with the procedure for Constitutional Amendments. *See Boerne*, 521 U.S. at 529 (referring to Article 5 as the exclusive means for creating expanding constitutional rights). The Constitution's federalism limitations necessarily apply to federal government action, regardless of which federal branch created the remedial scheme. Thus, a preventative federal scheme that precludes lawful state conduct would be constitutional only if the *Miranda* Court had a clear record of " 'widespread and persistent deprivation of constitutional rights.' " *College Savings Bank*, 119 S.Ct.at 2210 (1999) (*quoting Boerne*, 521 U.S. at 526).

2. Miranda Lacks an Adequate Record of Widespread and Persistent Constitutional Violations.

The *Miranda* Court relied on a record as weak as the legislative record found lacking in *Boerne*. In *Boerne*, the Court found that the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, was not true remedial legislation, but was instead an attempt to create a new substantive right. This Court noted that RFRA's legislative record lacked recent examples of constitutional violations.[16] Rather, the record showed a pattern of conduct (generally applicable regulation that incidentally affected certain religions) that did not arise to the level of a constitutional violation. *Boerne*, 521 U.S. at 531.[17]

The *Miranda* record is likewise deficient. The Court's basis for *Miranda* was a series of reports indicating police threats of, or use of, force had been a common practice in the early 1930's, 384 U.S. at 445, to one Supreme Court case from that period, six Supreme Court Cases from the 1940s, and one from 1954. *Id.* The worst it could say about

---

[16] *See Boerne*, 521 U.S. at 530 (noting that the legislative record "lack[ed] examples of modern instances of generally applicable law passed because of religious bigotry . . . " and that "[t]he history of persecution in this country detailed in the hearings mentions no episode in the past 40 years.").

[17] *See also Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 649-50(1999) (finding legislative record consisting of isolated sentences clipped from floor debates and legislative reports, combined with a 1966 California state report on age discrimination in the State's public agencies, insufficeint to establish pattern of unconstitutional age discrimination by the States in 1974); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) *passim* (Isolated instances of patent infringement suits against the States insufficient to establish a pattern of State patent infringement, let alone a pattern of constitutional deprivations of property without due process of law).

then-current (1966) conditions was that "[t]he Commission on Civil Rights in 1961 found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions,' " *id.* at 446, and that [t]he use of physical brutality and violence is not, unfortunately relegated to the past or to any part of the country." *Id.* The evidence the Commission relied upon for this sweeping statement was one (1) 1965 case involving police brutality against a witness, five (5) state cases from 1945 to 1959 involving *other kinds* of police misconduct, a 1959 report from the Illinois division of the ACLU on Secret Detention by the Chicago Police, a 1950 law review article, and a 1965 law review article. *Id.* In fact, the Court conceded that "the examples given above are undoubtedly the exception now." *Id.* at 447. Furthermore, interrogation by physical force or threat of physical force was already excluded in 1966 under the Due Process clause thus rendering the *Miranda* exclusion rule unnecessary to address the problem.

While *Miranda* cites very few instances of coerced statements, it describes in elaborate detail suggestions from what it calls "police manuals and texts" on techniques for questioning suspects. 384 U.S. at 448. From these documents, the *Miranda* Court simply identified features of custodial interrogations that, particularly over a long period of time *could* break down a suspect's will. There was no evidence in the *Miranda* record of the actual use of the techniques. 384 U.S. at 532-33 (White, J., dissenting) (noting that there was no evidence about the extent to which the 1959 and 1962 manuals were used, that the majority had not examined any interrogation transcript, and that the empirical evidence actually available suggested that sustained interrogations were rare).

The majority proceeded to treat this "potentiality for compulsion", *id.* at 457, as *itself* the pervasive evil justifying the specified prophylactic measures, there was no demonstration that this potentiality was realized so frequently as to make compulsion itself pervasive. This

bootstrapping exercise is virtually identical to the exercise undertaken to support the Religious Freedom Restoration Act struck down in *Boerne*. Just as the potential for religious bigotry failed to justify sweeping prophylactic measures against the States, the potential for compulsion in interrogation fails to justify the sweeping prophylactic exclusionary rule of *Miranda*. The Self-Incrimination Clause does not forbid "potential compulsion," but rather actual compulsion.

The *Miranda* record of widespread and persistent actual constitutional violations is no stronger than the inadequate record in *Boerne*. 521 U.S. at 525-26. *Compare Miranda*, 384 U.S. at 444-58 *with South Carolina v. Katzenbach*, 383 U.S. 301, 310-15, 333-34 (1966) (Strong record of a determined and persistent effort to use literacy tests and other devises as covert mechanisms to deprive African Americans of the voting franchise; finding actual causal link between literacy tests and voting discrimination).

3. Miranda's Remedial Scheme Lacks Congruence.

Secondly, and in addition to a requirement of a record identifying widespread and persistent constitutional violations, the preventative scheme must be "congruent" to the constitutional deprivations identified. *Kimel*, 120 S.Ct. at 635. *Miranda's* approach lacks "congruence." *Miranda's* exclusionary scheme is not "congruent" because it is both over-inclusive and under-inclusive. It excludes un-warned voluntary statements yet fails to address the typical matters making a statement involuntary. As stated by the U.S. Justice Department:

> *Miranda's* system is a poorly conceived means of protecting suspects from coercion and overreaching in police interrogations. Its consequences are to divide suspects into two classes: those who stand on their rights and those who waive their rights and submit to questioning. The effect of *Miranda* on suspects in the former

> class is to not protect them from abusive questioning, but to enable them to insulate themselves from any form of questioning. In cases in which suspects do waive their rights, interrogations can be carried out much as they were before *Miranda*. In such circumstances *Miranda* is, in particular, virtually worthless as a safeguard against the specific interrogation practices that were characterized as abusive in the *Miranda* decision and cited as the empirical justification for *Miranda's* reforms.

U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), *reprinted in* UNIV. MICH. J. LAW REFORM 451, 544 (1989).

Miranda is the wrong tool for the job. There is no satisfactory "congruence" between the *Miranda* remedial scheme and involuntary confessions.

4. Miranda's Remedial Scheme Lacks Proportionality.

Finally, *Miranda's* third glaring failure is the lack of "proportionality" in its exclusionary rule. *See Kimel*, 120 S.Ct. at 635; *College Savings Bank*, 119 S.Ct. at 2224; *Boerne*, 521 U.S. at 519. It is hard to imagine a more intrusive federal mandate that has caused such a wholesale change in the state criminal justice process than *Miranda*. *Miranda* controls police investigations, requires particular types of state court hearings, and restricts the states' ability to present often-critical evidence of guilt. More importantly, it restricts the ability of States to experiment with their own criminal justice models that grant greater respect to the rights of victims. It is quite conceivable that a state could decide that a legitimate victim's interest included an interest in a prosecution. In fact, states do recognize a crime victim's interest in prosecution where a prima facie case exists and provide

procedures for victims to challenge a prosecutor's decision not to prosecute.[18]

Similiarly, the victim has an interest in the admissibility of a voluntary confession which may be a necessary predicate to successful prosecution. "A core interest of the victim is that the truth be revealed and an appropriate disposition reached." Beloof, *supra*, 1999 UTAH L. REV., at 296. The prophylactic remedial scheme of the *Miranda* exclusionary rule prevents states from acknowledgment of the victim's interest in the admissibility of a voluntary confession.

D. Section 3501 Appropriately Excludes Involuntary Confessions.

For these reasons, this Court should hold that *Miranda* is not immune from legislative revision and does not preclude the States from experimenting with their own criminal justice models. There are many ways that States could fully protect a criminal defendant's right against compelled self-incrimination while considering the interests of crime victims. This Court has recently recognized that Supreme Court prophylactic rules should not be construed as the only means for ensuring State compliance with the Constitution. *See Smith v. Robbins*, ___U.S.___, 120 S.Ct. 746, 756 (2000) (the *Anders* procedure is only one

---

[18] *E.g., Commonwealth v. Benz*, 585 A.2d 764 (Pa. 1989) (Upholding statutory scheme for court to order prosecution where probable cause to charge exists and the state refuses to prosecute); *State of Wisconsin v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989) (Upholding statute providing for trial court investigation and trial court indictment independent of public prosecutor); *State ex rel. Miller v. Smith*, 382 S.E. 5[illegible]0 (W.Va. 1981) (Upholding right of victim to directly report crime to Grand Jury, criticizing federal practice for denying such access); TENN. CODE ANN. § 40-12-104 (codifying procedure for grand jury access for person having knowledge of offense); *See generally* Douglas Beloof, VICTIMS IN CRIMINAL PROCEDURE, 235-359 (1999) (Chapter 5, The Charging Process).

method of satisfying Constitutional requirements for indigent criminal appeals and the States may adopt different procedures if they adequately safeguard a criminal defendant's right to appellate counsel).

Under the Constitution, Section 3501 is an appropriate exercise of Congress's power. The *Miranda* decision itself recognized that Congress could create its own scheme for ensuring compliance with the Fifth Amendment. 384 U.S. at 467. Here, the scheme actually chosen by Congress ensures that involuntary confessions will be excluded from federal criminal trials. *See* 18 U.S.C. § 3501. In addition, Congress continued to encourage the use of *Miranda* warnings by making them a factor to be considered by the federal court during its voluntariness determination. *Id.*

States should likewise be permitted to create such legislative schemes so long as they do not impair the criminal defendant's Fifth Amendment right against self-incrimination. States should be permitted by the Court to create schemes that encourage a better understanding of the interests of all participants in the criminal process, including crime victims. Such separate state schemes encourage the thoughtful growth of our criminal justice process.

Even if this Court determines that Congress exceeded its legislative powers by enacting Section 3501, this Court should restrict the sweeping language contained in the *Miranda* decision. This Court should, as it did in *Smith v. Robbins*, make clear that the Court's own prophylactic rules are not the exclusive means for ensuring compliance with the Constitution and that States remain free to develop criminal justice models that grant greater protection to victims so long as the states still adequately safeguard the constitutional rights of the criminal defendant.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

DOUGLAS E. BELOOF

Mar 9 1999

No. 99-5525

Supreme Court, U.S.
FILED
MAR 9 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF *AMICUS CURIAE* FRATERNAL ORDER OF POLICE URGING AFFIRMANCE

THOMAS T. RUTHERFORD
GENERAL COUNSEL
GRAND LODGE,
FRATERNAL ORDER OF POLICE
1910 Ridgecrest, S.E.
Albuquerque, NM 87108
(505) 265-7129

PATRICK F. PHILBIN
Counsel of Record
THEODORE W. ULLYOT
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae
Fraternal Order of Police

March 9, 2000

BEST AVAILABLE COPY

3700

QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. Section 3501, notwithstanding that the confession was taken in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. *Miranda*'s Rigid Exclusionary Rule – Often Requiring the Exclusion of Entirely Voluntary Statements Due to Technical Errors Determined Only Years After the Fact – Imposes Significant Costs in Hindering Law Enforcement's Efforts To Solve Crimes and Take Criminals Off the Streets 5

II. There Is No Need To Overrule *Miranda* To Affirm the Decision Below and Confirm That Section 3501 Is "The Statute Governing the Admissibility of Confessions In Federal Prosecutions" 8

A. *Miranda*'s Prophylactic Regime Is Not Dictated by the Constitution Itself 8

B. The Court Need Not Overrule *Miranda* To Enforce Section 3501 16

III. The Principal "Practical" Arguments Raised Against Section 3501 Do Not Withstand Scrutiny; To the Contrary, Section 3501 Represents the Best of Both Worlds 21

A. *Miranda*'s "Bright Lines" Are Not So Bright 21

B. Section 3501 Represents the Best of Both Worlds: It Retains Incentives for Law Enforcement Officers To Provide Warnings and Ensures that Voluntary Confessions Will Not Be Excluded Due to Technical Errors 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Anders v. California, 386 U.S. 738 (1967) 17

Berkemer v. McCarty, 468 U.S. 420 (1984) 22, 24, 26

Bounds v. Smith, 430 U.S. 817 (1977) 19, 20

City of Boerne v. Flores, 521 U.S. 507 (1997) 16

Davis v. United States, 512 U.S. 452 (1994) 3, 6, 9, 13, 22

Duckworth v. Eagan, 492 U.S. 195 (1989) 9, 14, 15

Edwards v. Arizona, 451 U.S. 477 (1981) 12, 22

Fare v. Michael C., 442 U.S. 707 (1979) 7

Lewis v. Casey, 518 U.S. 343 (1996) 19, 20

Maine v. Moulton, 474 U.S. 159 (1985) 10

Michigan v. Tucker, 417 U.S. 433 (1974) 8, 13, 23

Minnick v. Mississippi, 498 U.S. 146 (1990) 11

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 9, 11, 14

New York v. Quarles, 467 U.S. 649 (1984) 8, 22, 23

North Carolina v. Butler, 441 U.S. 369 (1979) 22

Oregon v. Elstad, 470 U.S. 298 (1985) 8, 9, 14, 15, 22

Pennsylvania v. Finley, 481 U.S. 551 (1987) 18

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 22

Penson v. Ohio, 488 U.S. 75 (1988) 18

Rhode Island v. Innis, 446 U.S. 291 (1980) 22

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 12, 14

Smith v. Robbins, 120 S. Ct. 746 (2000) 17, 18

United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) ... 3

United States v. Cronic, 466 U.S. 648 (1984) 10

United States v. Gouveia, 467 U.S. 180 (1984) 10

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 16

Withrow v. Williams, 507 U.S. 680 (1993) 6, 7, 9, 11, 23, 27

Constitution and Statutes

18 U.S.C. § 3501 ..... *passim*

U.S. Const., amend. IV 12, 14

U.S. Const., amend. V 7, 9-12, 14-16, 24

U.S. Const., amend. VI 10

Miscellaneous

Memorandum from Larry R. Parkinson, General Counsel, Federal Bureau of Investigation (Oct. 19, 1999) (lodged by the United States, Feb. 24, 2000) 25

Memorandum from Richard A. Fiano, Chief, Domestic Operations, Drug Enforcement Administration (Oct. 13, 1999) (lodged by the United States, Feb. 24, 2000) 6

Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearing Before the Subcomm. on Criminal Justice Oversight of the Sen. Judiciary Comm., 106th Cong., 1st Sess. 23 (1999) (statement of Gilbert G. Gallegos, President, Grand Lodge, Fraternal Order of Police) 6, 23

No. 99-5525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF *AMICUS CURIAE* FRATERNAL ORDER OF POLICE URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*[1]

The Fraternal Order of Police ("the F.O.P.") is the Nation's largest organization of law enforcement professionals and represents more than 277,000 rank-and-file law enforcement officers in every region of the country. The F.O.P. believes it is particularly important for it to participate in this

---

[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

case, as a friend of the Court, to provide its views on the current operation of the *Miranda* exclusionary rule and to rebut any suggestion that the views expressed in the briefs of Petitioner's *amici* represent the voice of American law enforcement.

With all respect to those among Petitioner's *amici* who have some experience in law enforcement, particularly those *amici* on the brief filed on behalf of General Griffin B. Bell *et al.* (the "Bell *amici*"), those *amici* have far less experience than the rank-and-file membership of the F.O.P. in implementing *Miranda* in real-life situations that arise in front-line police work. Accordingly, the views of Petitioner's *amici* as to how *Miranda* operates in practice are of limited value in apprising the Court of the law enforcement community's view of *Miranda*. By contrast, the F.O.P. membership represents the segment of American law enforcement that is charged with the responsibility of implementing *Miranda* in the field on a day-to-day basis, and thus the F.O.P. can better provide this Court the views of American law enforcement concerning the impact of *Miranda* on their work in enforcing the Nation's criminal laws.

SUMMARY OF ARGUMENT

Based on the extensive real-world experience of its membership, the F.O.P. strongly supports the decision below.

1. Contrary to the suggestions of Petitioner and his *amici*, American law enforcement agencies have not "learned to live with *Miranda*" in the sense that they find it no obstacle to their task of enforcing the Nation's criminal laws. To the contrary, the members of the F.O.P., who take on the front line of police work across the country, find one of the most frustrating aspects of their jobs to be the release of admitted criminals based on technical errors in administering *Miranda* warnings or securing a waiver of *Miranda* rights. By excluding

even wholly voluntary admissions of guilt whenever there has been the slightest misstep in adhering to *Miranda*'s regime, *Miranda*'s rigid exclusionary rule hinders good faith, professional police work and makes it unnecessarily difficult to take criminals off the streets.

2. Section 3501 of Title 18 of the United States Code is "'the statute governing the admissibility of confessions in federal prosecutions,'" *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994)), and it was therefore entirely appropriate for the Fourth Circuit to assess the admissibility of Petitioner's confession according to the standards set forth in that provision. By confirming that Section 3501 governs the admissibility of confessions in federal court, this Court would not need to "overrule" *Miranda*, as some have suggested. The Court has repeatedly made it clear that the *Miranda* regime sets out a number of prophylactic safeguards that are not requirements of the Constitution itself. The Court has, moreover, on numerous occasions endorsed alternatives to previously announced "prophylactic" rules – such as the *Miranda* rule – as sufficiently protective of the core constitutional right at issue (here, the right against compelled self-incrimination), *without overruling the decision that announced the prophylactic rule*. That is the course the Court should follow here. Indeed, Section 3501 expressly mentions the giving of *Miranda*-like warnings as a factor for a court to consider in determining whether a confession was voluntary (and thus admissible), which suggests that *Miranda* should remain good law as a safe harbor for police who want to ensure that statements they obtain will be admissible in court.

3. This case vividly illustrates the virtue of the Section 3501 approach. Application of the *Miranda* exclusionary rule here would have resulted in the suppression of a serial bank robber's voluntary confession, due to a finding

of a technical violation of the *Miranda* rules. By refocusing the court's inquiry on the core constitutional question of whether the suspect's confession was voluntary, however, Section 3501 ensured that a finding of a technical error – an error that resulted in no *actual constitutional injury* to Petitioner – did not trigger the drastic remedy of exclusion of a voluntary confession.

As illustrated by this case, therefore, Section 3501 represents a "win-win" solution. On the one hand, the statute not only provides ample sanction to ensure that law enforcement officers do not cause *actual constitutional harm* by coercing a suspect into an involuntary confession; it also retains strong incentives for police to continue unchanged their current practice in administering *Miranda*'s prophylactic warnings. The statute, after all, expressly lists the *Miranda* warnings as factors to be considered by a court in determining whether a confession is voluntary and admissible. Continued adherence to *Miranda* will thus provide police a safe harbor virtually ensuring the admissibility of any statements they obtain from suspects. For this reason, the F.O.P. fully expects law enforcement officers to continue to give *Miranda* warnings even under a Section 3501 regime.

On the other hand, Section 3501 also has the added virtue – to victims of crime, to law enforcement officers, and to the Nation – of redirecting the courts' attention to the constitutional requirement of *voluntariness*. As a result, the statute will ensure that technical errors by law enforcement personnel no longer will *automatically* result in the suppression of voluntary confessions. A decision reaffirming the primacy of Section 3501 would thus continue to protect the constitutional rights of the accused, while reducing significantly the current high cost of *Miranda*'s prophylactic rule.

Finally, the "practical" arguments that have been advanced against Section 3501 do not withstand scrutiny. As this Court has recognized on several occasions, *Miranda* is far from the easily administered, "bright line" rule that some claim. And the supposed "obvious flaws" of the regime under Section 3501, under which warnings would no longer be compelled by an iron-clad exclusionary rule, are neither obvious nor logical.

ARGUMENT

I. *Miranda*'s Rigid Exclusionary Rule – Often Requiring the Exclusion of Entirely Voluntary Statements Due to Technical Errors Determined Only Years After the Fact – Imposes Significant Costs in Hindering Law Enforcement's Efforts To Solve Crimes and Take Criminals Off the Streets.

The F.O.P. wishes to respond, first and foremost, to assertions made by Petitioner and his *amici* urging reversal of the decision below in part on the policy-based ground that law enforcement officers have learned to "live with *Miranda*" and that there is no point in even considering enforcing a statute that would alter the operation of the rigid exclusionary rule established by that case. On behalf of its nearly 300,000 members, the F.O.P. feels compelled to dispel the fallacies in such assertions.

If Petitioner simply means to say that law enforcement officers have done (and will continue to do) their very best to follow whatever rules the Supreme Court establishes, it is certainly true that the law enforcement community has learned to "live with *Miranda*." Likewise, if Petitioner means to say that police officers have (by and large) learned the standard four-line script of the *Miranda* warnings, it is indeed accurate to say that law enforcement has learned to "live with *Miranda*." If, however, Petitioner means to say that the law enforcement community is content with the operation of *Miranda* and its

impact on efforts to enforce the Nation's criminal laws such that it does not seek improvements on the current *Miranda* regime, then it is decidedly *not* the case that officers have learned to live with *Miranda*.

The current *Miranda* regime has certain benefits, but it also suffers from significant and well-chronicled flaws. As the F.O.P. has recently explained to Congress, the simple fact of the matter is that the *Miranda* regime interferes with the ability of police officers to solve violent crimes and take dangerous criminals off the streets. *See, e.g.*, Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearing Before the Subcomm. on Criminal Justice Oversight of the Sen. Judiciary Comm., 106th Cong., 1st Sess. 23 (1999) (statement of Gilbert G. Gallegos, President, Grand Lodge, Fraternal Order of Police); Memorandum from Richard A. Fiano, Chief, Domestic Operations, Drug Enforcement Administration (Oct. 13, 1999) (lodged by the United States, Feb. 24, 2000) (describing "chilling effect" of *Miranda* warnings on DEA investigations); *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (federal government's repeated refusal to invoke Section 3501 rather than *Miranda* "may have produced . . . the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this."); *Withrow v. Williams*, 507 U.S. 680, 704 (1993) (O'Connor, J., concurring in part and dissenting in part) (stating, with respect to the *Miranda* exclusionary rule, that "[a]ny rule that so demonstrably renders truth and society 'the loser,' bear[s] a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness'") (citation omitted).

The main culprit is not simply the *Miranda* warnings themselves, which suspects have often heard time and again, and which are easily memorized by police officers. Rather, the

barrier to effective police work comes primarily from two other aspects of the *Miranda* regime working in tandem.

First, implementing *Miranda* requires officers to make subtle determinations in often difficult circumstances – determinations including when a stop has matured into "custody" (triggering the need for warnings) and whether a waiver is valid. *See infra* p. 22. Thus, adhering to all the refinements of the regime established by *Miranda* and its progeny is simply not, as Petitioner suggests, "an extraordinarily simple act." Petr. Br. 44.

Second, *Miranda*'s rigid exclusionary rule prevents the use even of voluntary confessions if a police officer has committed even a technical violation of *Miranda* (or its progeny). If an officer misjudges when a suspect has been placed in custody and asks even a single question that elicits an incriminating response, a court will later suppress the statement and an admitted criminal may well go free. As this Court has acknowledged, *Miranda* imposes burdens "on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). *See also Withrow*, 507 U.S. at 707 (O'Connor, J., concurring in part and dissenting in part) ("*Miranda*'s prophylactic rule is not merely 'divorced' from the quest for truth but at war with it as well.").

American law enforcement has emphatically *not* learned to "live with" these shortcomings of *Miranda*. Indeed, the exclusion of voluntary confessions as a result of technical errors in applying *Miranda* ranks as one of the most frustrating experiences faced by the F.O.P.'s members. As F.O.P. President Gilbert Gallegos recently explained to Congress, virtually every officer on the street can recall a list of cases on

which he or she worked in which an admittedly guilty defendant was released because, months or years after the police had finished their work, a technical violation of *Miranda* was found that resulted in suppression of a voluntary statement. The rigid *Miranda* exclusionary rule – which this Court indicated from the outset was merely "prophylactic" in nature, and was not intended to represent the only possible means of protecting a suspect's constitutional rights – is thus not a rule that law enforcement views as reflecting the optimal balance between protecting suspects' rights and ensuring efficient enforcement of the law.

II. There Is No Need To Overrule *Miranda* To Affirm the Decision Below and Confirm That Section 3501 Is "The Statute Governing the Admissibility of Confessions In Federal Prosecutions."

One of the principal arguments advanced by Petitioner and his *amici* is that to uphold the decision below (and to affirm the validity of Section 3501) would require "overruling" *Miranda*. The Fourth Circuit correctly rejected that theory. The *Miranda* rules are merely "prophylactic," and the Court has demonstrated repeatedly that it is possible to uphold an alternative to a prophylactic rule without overruling the decision that initially set forth the rule. The F.O.P. respectfully urges the Court to adopt that approach once again here.

A. *Miranda*'s Prophylactic Regime Is Not Dictated by the Constitution Itself.

Time and again the Court has emphasized that "[t]he prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (same). *See also*

Davis v. United States, 512 U.S. 452, 457 (1994) (*Miranda* warnings are "a series of *recommended* procedural safeguards" that are "not themselves rights protected by the Constitution") (emphasis added). Thus, the Court has explained that the "*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). *See also Moran v. Burbine*, 475 U.S. 412, 424 (1986) ("As is now well established, the *Miranda* warnings are not themselves rights protected by the Constitution."); *Withrow*, 507 U.S. at 706-07 (O'Connor, J., concurring in part and dissenting in part) ("[T]here is no constitutional right to the suppression of *voluntary* statements. Quite the opposite: The Fifth Amendment, by its terms, prohibits only *compelled* self-incrimination; it makes no mention of 'unwarned' statements. On that much, our cases could not be clearer.") (emphases in original). As a result, as Justice O'Connor has succinctly summarized, "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

In his effort to portray the *Miranda* warnings as inexorable commands of the Fifth Amendment, Petitioner repeatedly asserts that it is crucial to *inform* a suspect of his rights, to ensure that privileges under the Fifth Amendment are knowingly exercised or waived. *See, e.g.*, Pet. Br. 16, 38. According to Petitioner, the right to be free from compelled testimony inherently demands that a suspect must subjectively *know* that he has a constitutional right to refuse to speak. But the nature of the right Petitioner describes is not found in this Court's precedents and distorts the protection the Fifth Amendment provides. Petitioner's approach suggests that part of the critical constitutional value to be protected under the Fifth Amendment is the individual's ability to make a decision

whether or not to speak to the police only while fully aware of the exact extent of his right to refuse to talk – in other words, that a suspect has only been afforded the protection intended by the Framers of the Fifth Amendment if he is specifically informed of the nature of his right to refuse to speak to the authorities investigating a crime. But the Fifth Amendment provides a limitation on the *government* to ensure that *government agents* do not coerce a suspect to talk. If a criminal suspect has not been subjected to any police measures that overcome his will or that compel him to speak, and he makes a *voluntary* statement, the rights secured by the Constitution have been fully vindicated. The strictures of the Fifth Amendment, in other words, are not designed to promote an abstract value in ensuring that suspects speak to the police only while fully aware of all of their rights. As long as the individual is free from official compulsion, the constitutional commands have been satisfied.

In that regard, it is worth noting a distinction between the right secured by the Fifth Amendment and other individual rights protected by the Constitution. Under the Sixth Amendment, for example, once judicial criminal proceedings have commenced against an individual and the Sixth Amendment right to counsel attaches, *see, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 187 (1984), it is typically assumed that it promotes the proper functioning of our adversarial system of justice and the efficient search for truth if a defendant is represented by counsel. *See, e.g.*, *Maine v. Moulton*, 474 U.S. 159, 168-69 (1985); *United States v. Cronic*, 466 U.S. 648, 656 (1984) ("Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself.") (internal citations and quotations omitted).

Petitioner's arguments tacitly rest on the assumption that promoting the exercise of the "right to remain silent" (which is really only a verbal formulation describing the *result*

of guaranteeing that individuals must be free from compelled testimony) is somehow in itself a positive objective of the Fifth Amendment. Once again, that distorts the nature of the right. To be sure, individuals are free not to talk to the police under the Fifth Amendment, and vigilantly guarding the individual's right to be free from compulsion and to choose that course is vital to preserving a free society. But the value to individual freedoms that comes from preserving that right derives from the restriction on government action precluding the resort to coercion to obtain statements from criminal suspects. There is nothing about silence in the face of a lawful investigation of criminal conduct that is, *in itself*, a positive good.

To the contrary, as this Court has repeatedly recognized, voluntary "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (citation omitted). *See also Elstad*, 470 U.S. at 305 ("[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable.") (citation and internal quotations omitted). *Cf. Withrow*, 507 U.S. at 703 (O'Connor, J., concurring in part and dissenting in part) ("[B]ecause *voluntary* statements are 'trustworthy' even when obtained without proper warnings, their suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact.") (emphases in original) (citation omitted); *Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system."). If a suspect in custody talks to the police free from compulsion, whether or not he was fully aware of the complete panoply of rights afforded to him under the Constitution, he has still suffered no constitutional injury and the purposes and objectives of the Fifth Amendment have been fully served.

An analogy to this Court's jurisprudence under the Fourth Amendment helps illustrate the point. The Fourth Amendment guarantees individuals a "right" to be "secure . . . against unreasonable searches and seizures." U.S. Const., amend. IV. But an individual's rights under the Fourth Amendment plainly would not be violated if police asked for and obtained consent to search his house without first explaining that he could freely refuse consent. As long as the individual has voluntarily consented, the search is not unreasonable and the protections established in the Constitution have been fully vindicated. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 242-89 (1973).

Thus, by arguing that a suspect must have subjective knowledge of the "right to remain silent" for his Fifth Amendment rights to be preserved at all, Petitioner is seeking to change the nature of the protection provided by the Fifth Amendment. The new principle that Petitioner seeks to have the Court adopt is that "[w]ithout knowledge on the part of the individual being questioned as to what choices are available to him, statements cannot be deemed truly voluntary." Petr. Br. 3.[2] But the Court has long recognized that rights under the Constitution designed to protect an individual from compulsion and to preserve voluntary action do *not* necessarily require that an individual have subjective knowledge of the exact right conferred by the Constitution. As the Court explained in *Edwards v. Arizona*, 451 U.S. 477 (1981), *Schneckloth* "emphasized that the voluntariness of a consent or an admission

[2] Petitioner tacitly acknowledges the shift in understanding of the Fifth Amendment he seeks as he notes that "[w]hile expressed as a limitation on government power," in his view the constitutional command "necessarily means that the individual has an *affirmative right* to remain silent, and any waiver must be knowing, intelligent, and voluntary." Petr. Br. 38 (emphasis added).

on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries" *id.* at 484.[3] Petitioner would collapse the distinction. As Petitioner himself distills the core of his argument, he seeks to have the Court hold as a matter of constitutional law that, "[s]imply put, . . . no choice is voluntary where an inquisitor withholds critical information about the choice." Petr. Br. 16.

Adopting Petitioner's conception of the nature of voluntariness would have implications far beyond the confines of this case. Indeed, if the Court were to accept Petitioner's proposed expansion of *Miranda*, there would be no logical stopping point to Petitioner's version of "voluntariness" that would limit it from applying in the Fourth Amendment context as well. As a result, Petitioner's self-declared principle that "no choice is voluntary where an inquisitor withholds critical information about the choice," Petr. Br. 16, would, if adopted, likely require the Court next to reconsider its holding in *Schneckloth* that consent for a search may be voluntary under

[3] It is true, as Petitioner points out, *see* Petr. Br. 35, that in *Davis v. United States*, 512 U.S. 452 (1994), the Court noted that "[t]he right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it requires the special protection of the knowing and intelligent waiver standard." *Id.* at 458 (internal quotations and alterations omitted). In the very same discussion, however, the *Davis* Court made clear that "[t]he right to counsel established in *Miranda* was one of a 'series of recommended procedural safeguards . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'" *Id.* at 457 (quoting *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)). The mere fact that the Court decided to apply a high waiver standard to the prophylactic "right" it created does not change the underlying non-constitutional nature of the right, nor does it make the waiver standard the Court has applied a constitutional requirement itself.

the Fourth Amendment even absent a warning that the individual was free to withhold consent.[4]

From the foregoing it should be plain that neither precedent nor reason suggest that *Miranda*'s commands are inexorable requirements of the Constitution itself or that a criminal suspect must be expressly informed of his rights under the Fifth Amendment for his right to be free from compulsion to be respected. Instead, in *Miranda* the Court was self-consciously reconciling opposing interests to establish a prophylactic rule that went further than the Constitution required to protect underlying constitutional rights. As the Court has explained, "[a]s any reading of *Miranda* reveals, the decision . . . embodies a carefully crafted balance designed to fully protect both the defendant's and society's interests." *Moran*, 475 U.S. at 433 n.4 (emphasis omitted).

Section 3501 simply represents the considered judgment of the elected representatives of the People that in crafting a prophylactic rule that "overprotects" the rights secured by the Fifth Amendment, *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring), that "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985), and that inevitably will require the exclusion of some voluntary confessions where the suspect "has suffered no identifiable constitutional harm," *id.* at 307, *Miranda* did not strike the proper balance. In Congress's view, society simply pays too high a price when it adheres rigidly to *Miranda*'s overprotective exclusionary rule and thereby permits – often on the basis of a technical error determined by a court only years

[4] The *Schneckloth* Court itself acknowledged the logical link between the voluntariness inquiry under the Fifth and Fourth Amendments by applying the voluntariness test developed in Fifth Amendment and Fourteenth Amendment cases concerning confessions to the Fourth Amendment search context. *See Schneckloth*, 412 U.S. at 223-25.

after a police officer on the street has done his best to adhere to *Miranda*'s dictates – "the release of an admittedly guilty individual who may pose a continuing threat to society." *Duckworth v. Eagan*, 492 U.S. 195, 211 (O'Connor, J., concurring).[5] Congress, in other words, has simply determined that it should apply more broadly the same conclusion that this Court has reached in limiting the application of *Miranda* in subsequent cases; namely, that "[i]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Elstad*, 470 U.S. at 309. The F.O.P. emphatically agrees with Congress's judgment.

Moreover, it is plainly a judgment that, under our constitutional structure, Congress is allowed to make. If *Miranda*'s rigid exclusionary rule for any and all failures to comply with the details of *Miranda*'s warning procedures is not an inevitable command of the Fifth Amendment itself, it is open to Congress to define a standard for admissibility of self-incriminating statements in federal courts that hews more closely to the constitutional line. Indeed, it is precisely the Legislative branch that is best positioned to make judgments about where – among constitutionally permissible alternatives – to draw the line. It can hardly be disputed that Congress is far better suited than this Court to gather and evaluate evidence concerning the effects that different rules might have on the

[5] *Cf. Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring) ("In the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values, [*Miranda*] *sacrifices society's interest* in uncovering evidence of crime and punishing those who violate its laws.") (emphasis added); *Elstad*, 470 U.S. at 312 (when an admission is not coerced, "little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder").

successful enforcement of the criminal statutes that Congress passes.[6] *See, e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). As Justice Kennedy recently wrote for the Court, "[o]ur national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). Here, Congress validly exercised its authority to define the admissibility of self-incriminating statements in federal courts, and this Court should enforce Congress's decision.

B. The Court Need Not Overrule *Miranda* To Enforce Section 3501.

Because *Miranda* did not purport to identify an inexorable command of the Constitution, the Court need not overrule that decision to uphold Section 3501. In similar situations, where the Court has confronted prophylactic measures of its own creation – measures not required by the Constitution itself but adopted to "safeguard" constitutional rights – the Court has repeatedly made clear that deviations from its prophylactic rules are acceptable *provided that* the underlying constitutional right at stake is not infringed. And,

---

[6] For this reason, the F.O.P. believes that the various studies the parties and *amici* cite concerning the impact of *Miranda* are largely beside the point. The question before this Court is a legal one: namely, whether *Miranda* embodies an inevitable command of the Fifth Amendment. The efforts of Petitioner's *amici* to amass studies and data purportedly demonstrating that *Miranda* has no negative impact on police clearance rates, or that suspects make false confessions without *Miranda* warnings, or any other number of points, *see, e.g.*, ACLU Br. 23 *et seq.* ("Data Confirm That *Miranda* Does Not Impede Law Enforcement"), simply confirm that the task of drawing any line more protective than that demanded by the Constitution is a policy task for which the political branches are far better suited than this Court.

significantly, in the cases where the Court has approved alternatives to its prophylactic rules, *it has not "overruled" the decisions setting forth the prophylactic rules*: those decisions have remained in place, serving as "safe harbors" for those wary of experimenting with alternatives.

The most recent illustration of this practice occurred earlier this Term, in *Smith v. Robbins*, 120 S. Ct. 746 (2000), in which the Court examined, and upheld, the procedure that has been adopted by the State of California to protect a defendant's constitutional right to appellate counsel. California's procedure – the "*Wende* procedure" – "departs in some respects" from the procedure that this Court described in *Anders v. California*, 386 U.S. 738 (1967), for protecting the right of appellate counsel.[7] On that basis it had been declared constitutionally inadequate by the Ninth Circuit. This Court reversed, emphasizing that "[t]he procedure [the Court] sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's [constitutional] right to appellate counsel," 120 S. Ct. at 753, and concluding that "the *Wende* procedure, like the *Anders* . . . procedure[], . . . affords adequate and effective appellate review for criminal indigents," *id.* at 763.

In explaining its ruling, the Court described the *Anders* rule in terms virtually indistinguishable from the terms the Court has used to describe *Miranda* – *i.e.*, as a "prophylactic" rule that is not constitutionally required, but rather serves to

---

[7] Specifically, "[u]nlike under the *Anders* procedure, counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous . . . nor requests leave to withdraw. Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing." *Robbins*, 120 U.S. at 753.

safeguard an underlying constitutional right. Thus, the Court recalled that

> In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), we explained that the *Anders* procedure is *not 'an independent constitutional command,'* but rather is *just 'a prophylactic framework'* that we established to vindicate the constitutional right to appellate counsel . . . . We did not say that our *Anders* procedure was the *only* prophylactic framework that could adequately vindicate this right; instead, by making it clear that the Constitution itself does not compel the *Anders* procedure, we suggested otherwise. Similarly, in *Penson v. Ohio*, 488 U.S. 75 (1988), we described *Anders* as simply erecting *'safeguards.'* *Id.* at 80.

120 S. Ct. at 757 (emphases added).

Significantly, the Court in no way "overruled" *Anders* in upholding the *Wende* procedure. *See, e.g., id.* at 763 ("[T]he *Wende* procedure, *like the Anders . . . procedure[], . . . affords adequate and effective appellate review for criminal indigents.*") (emphasis added). (Indeed, the Court was unmoved by the dissent's argument that "the Court has effectively overruled [*Anders*]." *Robbins*, 120 S. Ct. at 766 (Stevens, J., dissenting).) A State that does not want to incur the risk that its alternative procedure for protecting the right to appellate counsel will be declared invalid (or the expense of litigation) thus remains free to follow *Anders*.

While Petitioner does not even mention *Robbins*, the decision vividly illustrates that the Court need not "overrule" a decision setting forth a prophylactic rule to uphold an alternative procedure that provides fewer safeguards but still adequately protects the core constitutional right at issue.

The Court adhered to the same principle in *Lewis v. Casey*, 518 U.S. 343 (1996). Two decades before *Lewis*, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court had held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." In *Lewis* itself, a district court declared the Arizona Department of Corrections ("ADOC") to be in violation of *Bounds*, based on "a variety of shortcomings of the ADOC system, in matters ranging from the training of library staff, to the updating of legal materials, to the availability of photocopying services," 518 U.S. at 346, and ordered broad injunctive relief. This Court reversed, finding that the district court had failed "to identify anything more than isolated instances of *actual injury*." *Id.* at 349 (emphasis added).

In explaining what "actual injury" must be shown to establish a *Bounds* violation, this Court stressed that – contrary to the district court's apparent belief – *Bounds* had not established a "right to a law library or to legal assistance"; rather, "[t]he right that *Bounds* acknowledged was the (already well-established) right of access to the courts." *Id.* at 350 (emphasis omitted). As it did recently in *Robbins*, the Court in *Lewis* drew a sharp distinction between the constitutional right at issue (the right of access to the courts) and the prophylactic measures (law libraries and legal assistance) that had previously been approved as *one possible method* for protecting that core right.

> Although it affirmed a court order requiring North Carolina to make law library facilities available to inmates, [*Bounds*] stressed that that was *merely* "*one constitutionally acceptable method* to assure meaningful access to the courts," and that "our decision here ... does not

> foreclose alternative means to achieve that goal." [*Bounds*,] 430 U.S. at 830. In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825. . . . [A]n inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. . . . Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone" . . . .

Lewis, 518 U.S. at 350-51 (emphasis added).

Again, it bears emphasizing that while making clear that *Bounds*' "libraries-and-legal-assistance" formula was not the only acceptable means of protecting the constitutional right of access to the courts,[8] *Lewis* did not "overrule" *Bounds*. Indeed, the Court's refusal to overrule *Bounds* was in part what prompted Justice Thomas to write a separate concurrence. *See Lewis*, 518 U.S. at 365 (Thomas, J., concurring) ("I write separately to make clear my doubts about the validity of *Bounds* . . . .").

---

[8] *Lewis* reached this conclusion notwithstanding the statement in *Bounds* that "the fundamental constitutional right of access to the courts *requires* prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828 (emphasis added). This confirms that *Miranda*'s suggestions – so heavily relied on by Petitioner and his *amici* – to the effect that any alternative to *Miranda must* "appris[e] accused persons of their right of silence," *e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), cannot be read as rigidly as Petitioner urges.

Robbins and *Lewis* are thus two recent examples of instances in which the Court has endorsed (as sufficient to protect the core constitutional right at stake) an alternative to a "prophylactic" measure announced in a prior decision, without "overruling" that prior decision. That is the course the Court should follow here. It is not necessary to "overrule" *Miranda* to confirm that Section 3501 is a constitutionally acceptable framework for assessing the admissibility of confessions and for protecting the core right at issue (namely, a suspect's right to be free from compelled self-incrimination). From the time *Miranda* was decided (and indeed in *Miranda* itself), the Court repeatedly has made clear that the *Miranda* approach was never intended to be exclusive or to foreclose experimentation. And Section 3501 represents precisely the sort of alternative rule that the Court has approved in analogous cases – a rule that focuses the judicial inquiry on the relevant question whether an actual constitutional right has been violated. Section 3501 therefore should be upheld as a constitutionally permissible alternative to the prophylactic *Miranda* warnings, with *Miranda* left in place as a safe harbor for law enforcement personnel.

III. The Principal "Practical" Arguments Raised Against Section 3501 Do Not Withstand Scrutiny; To the Contrary, Section 3501 Represents the Best of Both Worlds.

A. *Miranda*'s "Bright Lines" Are Not So Bright.

One of the principal virtues of the *Miranda* regime, according to Petitioner and his *amici*, is that *Miranda* is supposedly an easily administered "bright line" rule. From the perspective of the F.O.P.'s membership, that is a vast oversimplification.

Although the *text* of the *Miranda* warnings may be clear, and perhaps even familiar to most sixth-graders, applying

Miranda in the field requires more than memorizing a four-line script. *Miranda* and its progeny require police officers to make instant, on-the-spot determinations on subtle questions that can easily divide panels of judges far better trained in the nuances of the law. Thus, officers must decide such matters as whether, for example, a routine traffic stop has evolved into a situation in which the suspect is in "custody," *see Berkemer v. McCarty*, 468 U.S. 420 (1984); whether a discussion has matured into an "interrogation," *see Rhode Island v. Innis*, 446 U.S. 291 (1980); whether a suspect has adequately waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369 (1979); whether a suspect's statement amounts to an unambiguous request for counsel, *compare Edwards v. Arizona*, 451 U.S. 477 (1981), *with Davis v. United States*, 512 U.S. 452 (1994); and whether any of the exceptions to *Miranda* applies, *see, e.g., New York v. Quarles*, 467 U.S. 649 (1984) ("public safety" exception); *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) ("routine booking" exception). The lines in these areas are hazy, not bright.[9] As this Court has expressly recognized, for example, "the task of defining 'custody' is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). *See also id.* at 316 (the question "of when 'custody' begins" can be "murky and difficult").

In praising the supposed simplicity of the *Miranda* regime, the Bell *amici* gloss over such difficult questions. In their view, *Miranda* is easy to apply because, *"[a]ssuming* that a suspect is in custody at the start of the interrogation, either the

---

[9] Notwithstanding their avowed support of *Miranda*, the Bell *amici* readily acknowledge that they consider some cases in the *Miranda* line to have been wrongly decided. *See* Bell Br. 5, 26. That is a significant admission, because these cases have contributed substantially to the blurring of the supposedly clear lines of *Miranda*.

warnings were given and a waiver was obtained, or they were not." Bell Br. 19 (emphasis added). But if one does not merely assume away the difficult problems, it is plain that "*Miranda* creates as many close questions as it resolves." *Withrow v. Williams*, 507 U.S. 680, 711-12 (1993) (O'Connor, J., concurring in part and dissenting in part). *See also* Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearing Before the Subcomm. on Criminal Justice Oversight of the Sen. Judiciary Comm., 106th Cong., 1st Sess. 23 (1999) (statement of Gilbert G. Gallegos, President, Grand Lodge, Fraternal Order of Police).

For officers in the field, a mistaken assessment of the circumstances as events are rapidly unfolding – even a good-faith assessment that is declared "mistaken" only years later, based on review in the far-removed confines of a judge's chambers – can, under the *Miranda* regime, result in the suppression of an entirely voluntary statement, the frustration of good-faith and professional police work, and in the release of an admitted criminal. It is inevitable, moreover, that such mistakes will occur. *See, e.g., Quarles*, 467 U.S. at 656 (recognizing the "kaleidoscopic situation[s] . . . confronting [law enforcement] officers" in investigating crimes); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) ("[T]he law . . . cannot realistically require that policemen investigating serious crimes make no errors whatsoever.").

B. Section 3501 Represents the Best of Both Worlds: It Retains Incentives for Law Enforcement Officers To Provide Warnings and Ensures that Voluntary Confessions Will Not Be Excluded Due to Technical Errors.

Section 3501 promises to bring a long-needed improvement to the law. In the F.O.P.'s view, the statute represents the best of both worlds. On the one hand, Section

3501 preserves the best aspects of *Miranda*. Of course, it should go virtually without saying that the statute continues to give police officers ample incentive to ensure that a suspect's constitutional rights are not violated – under Section 3501 no less than under *Miranda*, a statement obtained in violation of the Fifth Amendment is excluded at trial. In addition, by expressly listing the elements of the *Miranda* warnings among the factors to be considered in assessing voluntariness, Section 3501 also continues to provide officers a strong incentive to administer the prophylactic *Miranda* warnings. A statement obtained after proper *Miranda* warnings, after all, is virtually certain to be found voluntary. *See, e.g.*, *Berkemer*, 468 U.S. at 433 n.20 ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). Continued adherence to *Miranda*'s procedures will thus provide law enforcement officers with a valuable safe harbor – an opportunity virtually to ensure that statements they obtain in the course of their investigations will later be held admissible in court. As the court below explained, under Section 3501, "providing the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness." J.A. 211.

Indeed, it bears noting that the benefits some of Petitioner's *amici* see in *Miranda* as an affirmative *aid* in police work would still apply with full force under Section 3501 and thus further tend to confirm that *Miranda* warnings will still be given. The ACLU, for example, argues that *Miranda* provides valuable guidance to police concerning procedures to follow to ensure that suspects' statements will be admissible and aids interrogations by tending to establish some level of trust or confidence with the suspect. *See* ACLU Br. 19-20. To the extent the *Miranda* warnings yield these benefits, they will continue unabated even if Section 3501 supplies the rule on

admissibility, and thus these benefits only further confirm that officers attempting to solve crimes and clear cases will continue to administer the warnings. There is no reason to think that warnings that further police objectives in securing convictions of guilty criminals will be dropped simply because they are no longer required by an iron-clad rule. As a result, the F.O.P. fully expects that, if Section 3501 is upheld, officers will routinely continue to give *Miranda* warnings for the simple reason that the warnings will aid successful prosecutions by ensuring that statements obtained by police can be used at trial.[10]

At the same time, Section 3501 addresses the glaring shortcomings of the *Miranda* regime by making the voluntariness of a confession, rather than technical compliance with *Miranda*'s prophylactic procedures, the touchstone of admissibility. Section 3501 thus holds the promise of continuing copious protection of criminal suspects' underlying constitutional rights, while substantially reducing the high costs of the *Miranda* regime.

The various *amici* that have argued against upholding Section 3501, while exaggerating the clarity of *Miranda* and its progeny, have also vastly overstated purported difficulties under Section 3501 – particularly the supposed morass of difficult voluntariness determinations that would be thrust upon the courts under the statute. This parade of horribles is doubly flawed. First, the Bell *amici* improperly assume that under

---

[10] *See* J.A. 210-11 ("[L]est there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings.") *See also* Memorandum from Larry R. Parkinson, General Counsel, Federal Bureau of Investigation (Oct. 19, 1999) (lodged by the United States, Feb. 24, 2000) ("Regardless of the outcome of [this case], the FBI will not alter its policy" of giving warnings listed in *Miranda*).

Section 3501, *Miranda* warnings will cease to be given entirely and thus that *every case* will require a broad-ranging inquiry into an undifferentiated host of factors bearing on voluntariness. But this tacit assumption that police will instantly abandon current practices and revert to pre-*Miranda* procedures is entirely unrealistic. It wholly ignores the powerful incentives that police will have under Section 3501 to continue administering *Miranda* warnings – incentives that, as explained above, will ensure that in the overwhelming majority of cases such warnings will still be given. And for that very reason, the voluntariness inquiry will be vastly simplified. Even today, after all, under the *Miranda* regime, a defendant *can* argue that a statement made after proper *Miranda* warnings was actually coerced. That inquiry is not thought to place a great burden on the courts for the simple reason that it would take extraordinary circumstances to show that *Mirandized* statements were actually compelled. *See Berkemer*, 468 U.S. at 433 n.20. The same common-sense conclusion would undoubtedly apply no less under the totality-of-the-circumstances test under section 3501. As a result, wherever *Miranda* warnings were given, the inquiry into voluntariness would continue to be streamlined and easily manageable.

Second, even where *Miranda*-like warnings were not given to a suspect, there is simply no basis for assuming that a voluntariness standard, such as that of Section 3501, would necessarily be more difficult to apply than *Miranda*. *See* Bell Br. 13-17. Justice O'Connor disposed of that contention in her separate opinion in *Withrow*:

> [T]he supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined.

> Yet *Miranda* requires those lines to be drawn with precision in each case.
>
> The totality-of-the-circumstances approach, on the other hand, permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, *the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous*.

Withrow, 507 U.S. at 711-12 (O'Connor, J., concurring in part and dissenting in part) (emphasis added). Thus, whether a *Miranda* inquiry or a Section 3501 totality-of-the-circumstances test is more manageable depends on the facts of the case in question. To exchange the rigidity of *Miranda*'s exclusionary rule for the flexibility of Section 3501's command to evaluate the totality of the circumstances, therefore, is not to sacrifice judicial economy.

Moreover, even if it were true that a totality-of-the-circumstances test is more complex and time-consuming than *Miranda*, that is a price that American law enforcement is willing to bear. As we have explained, officers will for the most part continue to provide *Miranda* warnings even under a Section 3501 regime; accordingly, it is only in the case when an officer for some reason (such as a technical violation) fails to stay within the safe harbor provided by the *Miranda* warnings that the supposed "difficulties" of the voluntariness test will arise. And in those cases, law enforcement officers would much prefer to take the time to assist the court in undertaking a voluntariness inquiry – even though that inquiry might be time-consuming and require consideration of an array of factors

– rather than to see the confession *automatically suppressed* (as it would be under the inflexible *Miranda* exclusionary rule).

According to the Bell *amici*, even though law enforcement officials will likely continue to administer *Miranda* warnings in a Section 3501 regime, such a regime of warnings voluntarily administered has "several obvious flaws." Bell Br. 18. But a moment's scrutiny reveals that each of the three such alleged "flaws" they identify is illusory.

The first of the "flaws" is the alleged danger of "tinkering." The Bell *amici* contend that police agencies will not be content to administer the *Miranda* warnings in their present form, and will instead "undoubtedly" alter and modify the warnings; *amici* predict that this will result in "potentially endless" litigation, and "make the policies harder to follow and undermine compliance." Bell Br. 18. But they offer no explanation at all as to why – given the near-certainty that recitation of the familiar *Miranda* script will assure admissibility of any confession (under Section 3501, no less than today) – police will "tinker" with the language of the warnings. Police will not "tinker" merely for the sake of "tinkering." They will modify the *Miranda* script only if the modification produces some appreciable benefit (such as making the policy *easier* to follow, or *reducing* litigation). And if some (perhaps impulsively creative) police departments begin "tinkering" with the *Miranda* formulation, only to find that (as the Bell *amici* predict) their "tinkering" results in "endless litigation" and harder-to-follow policies, those departments will revert to the good old *Miranda* language.

The *second* "flaw" that the Bell *amici* assert is the alleged danger that "internal regulations" will not be "as effective as *Miranda* in encouraging police to administer warnings." Bell Br. 18. But that is simply an improper comparison. *Amici* are correct to suggest that, at present, the

primary source of "encouragement" for an officer to administer warnings comes not from "internal regulations" (most of which presently require officers to administer the *Miranda* warnings), but rather from the recognition that, absent warnings, any confession from a suspect will likely be excluded from evidence. The same will be true, however, under the Section 3501 regime: the principal motivation for administering warnings to suspects (then as now) will be the recognition that, if warnings are not given, any confession obtained by the officer may ultimately be excluded (pursuant to the terms of Section 3501, rather than *Miranda*). The fact that the department's "internal regulations" require the warnings will be secondary in the officer's mind – just as it is today.

Finally, the Bell *amici* raise the possibility that some departments will altogether cease providing warnings "as the memory of the value of Miranda fades." *Id.* at 19. But that theory defies logic. Departments would stop providing warnings altogether *only if* experience showed that such a "no warning" policy had *no adverse effect* on the admissibility of confessions obtained from suspects. That is a most unlikely prospect – to put it mildly – given that Section 3501 expressly identifies warnings as one of the factors to be considered in assessing voluntariness.

CONCLUSION

For the foregoing reasons, the Fourth Circuit's decision should be affirmed.

Respectfully submitted,

THOMAS T. RUTHERFORD
GENERAL COUNSEL
GRAND LODGE,
FRATERNAL ORDER OF POLICE
1910 Ridgecrest, S.E.
Albuquerque, NM 87108
(505) 265-7129

PATRICK F. PHILBIN
Counsel of Record
THEODORE W. ULLYOT
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae
Fraternal Order of Police

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

Mar 9 2000

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF AFFIRMANCE

GERALDINE R. GENNET
General Counsel
KERRY W. KIRCHER
Deputy General Counsel
MICHAEL L. STERN*
Senior Counsel
CAROLYN BETZ
Assistant Counsel
Office of General Counsel
United States House of Representatives
Washington, D.C. 20015
(202) 225-9700

March 9, 2000

* Counsel of Record

BEST AVAILABLE COPY

4pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. BECAUSE *MIRANDA*'S RULE THAT AN UNWARNED CONFESSION IS AUTOMATICALLY INADMISSIBLE IS NOT REQUIRED BY THE CONSTITUTION, SECTION 3501 CAN BE UPHELD WITHOUT "OVERRULING" *MIRANDA* 7

A. This Court's Post-*Miranda* Jurisprudence Establishes that the Constitution Does Not Require the Exclusion of Unwarned, but Voluntary, Statements 7

B. *Miranda*'s Statements Regarding the Minimum Requirements for Future Legislation are Dicta . 10

II. *MIRANDA*'S CONCLUSIVE PRESUMPTION THAT CUSTODIAL INTERROGATIONS ARE INHERENTLY COERCIVE IS NOT DICTATED BY THE CONSTITUTION AND WAS NOT BINDING ON CONGRESS 15

A. *Miranda*'s Conclusive Presumption is a Rule of Convenience, Not a Constitutional Requirement . 15

B. In Enacting Section 3501, the 1968 Congress Rejected *Miranda*'s Empircal Assessment of Custodial Interrogation 17

C. The 1968 Congress's Legal Disagreement With *Miranda* is Irrelevant 21

III. THE POLICY OBJECTIONS TO SECTION 3501 DO NOT CONSTITUTE A BASIS FOR INVALIDATING THE STATUTE 23

A. The Justice Department and Others Misstate the Costs and Benefits of Section 3501 24

B. Congress Has the Institutional Capability to Make Rules Governing Custodial Interrogations 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

American Foreign Serv. Ass'n v. Garfinkel,
490 U.S. 153 (1989) 1

Anders v. California,
386 U.S. 738 (1967) 12

Blodgett v. Holden,
275 U.S. 142 (1927) 6

Bowsher v. Synar,
478 U.S. 714 (1986) 1

Burke v. Barnes,
479 U.S. 361 (1987) 1

Bush v. Lucas,
462 U.S. 367 (1983) 28

California Attorneys for Criminal Justice v. Butts,
195 F.3d 1039 (9th Cir. 1999)
amended by, ___F.3d ___, 2000 WL 1639
(9th Cir. Jan. 3, 2000) 24

Church of the Lukumi Babali Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 15

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 11

Coleman v. Thompson,
501 U.S. 722 (1991) 16,17

Colorado v. Spring,
479 U.S. 564 (1987) 25

Columbia Broadcasting System, Inc. v. Democratic Naitonal Committee,
412 U.S. 94 (1973) 6

Davis v. United States,
512 U.S. 452 (1994) 8,27

Dep't of Commerce v. U.S. House of Representatives,
119 S. Ct. 765 (1999) 14

Diamond v. Chakrabarty,
477 U.S. 303 (1980) 28

Duckworth v. Eagan,
492 U.S. 195 (1989) 8,14

Edward J. Bartolo Corp. v. Florida Gulf Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 14

Harris v. New York,
401 U.S. 222 (1971) 12

Helstoski v. Meanor,
442 U.S. 500 (1979) 1

INS v. Chadha,
462 U.S. 919 (1983) 3

Japan Whaling Ass'n v. American Cetacean Soc'y
478 U.S. 221 (1986) 1

Kastigar v. United States,
406 U.S 441 (1972) 10

Michael M. v. Superior Court of Sonoma County,
450 U.S. 464 (1981) 22

Michigan v. Tucker,
417 U.S. 433 (1974) 8,16

Mincey v. Arizona,
437 U.S. 385 (1978) 10

Miranda v. Arizona,
384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine,
475 U.S. 412 (1986) 8

Morrison v. Olson,
487 U.S. 654 (1988) 1

New Jersey v. Portash,
440 U.S. 450 (1979) 10

New York v. Quarles,
467 U.S. 649 (1984) 15

Oregon v. Elstad,
470 U.S. 298 (1985) 8,9,16

Oregon v. Hass,
420 U.S. 714 (1975) 9

Raines v. Byrd,
521 U.S. 811 (1997) 1

Rostker v. Goldberg,
453 U.S. 57 (1981) 6,20,22

Schweiker v. Chilicky,
487 U.S. 412 (1988) 28

Smith v. Robbins,
120 S. Ct. 746 (2000) 12

Sorenson v. Sec'y of the Treasury,
475 U.S. 851 (1986) 28

State v. Randolph,
179 W. Va. 546, 370, S.E.2d 741 (1988) 25

State v. Valera,
74 Haw. 425, 848 P.2d 376 (1993) 25

United States v. Alvarez-Sanchez,
511 U.S. 350 (1994) 4

United States v. Crocker,
510 F.2d 1129 (10th Cir. 1975) 3

United States v. Di Re,
332 U.S. 581 (1948) 6

United States v. Eichman,
496 U.S. 310 (1990) 1

United States v . Helstoski,
442 U.S. 477 (1979) 1

United States v. Lopez,
415 U.S. 549 (1995) 6

United States v. O'Brien,
391 U.S. 367 (1968) 22

United States v. Rivas-Lopez,
988 F. Supp. 1424 (D. Utah 1997) 3

United States v. Watson,
423 U.S. 411 (1976) 6

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 7

Vance v. Terrazas,
444 U.S. 252 (1980) 7

Wallace v. Jafree,
472 U.S. 38 (1985) 21

Walters v. Nat'l Ass'n of Radiation Survivors
473 U.S. 305 (1985) 6,20

Withrow v. Williams,
507 U.S. 680 (1993) 8,13,14,26

Statutes

2 U.S.C. § 130f(b) 2

2 U.S.C. § 288k(b) 2

18 U.S.C. § 3501 ..... *passim*

H.R. Rep. 99-113 (1985) 2

House Rule II(8) 1

Pub. L. No. 96-132, § 21(a)(2), 93 Stat. 1040-1050 2

S. Rep. No. 90-1097 (1968) 19,20

Briefs

Brief *Amicus Curiae* of the House Democratic Leadership (2000) 22

Brief *Amici Curiae* of Americans for Effective Law Enforcement, Inc. Joined by the International Association of Chiefs of Police, Inc., the National Sheriffs' Association and the Virginia Association of Chiefs of Police (Jan. 18, 2000) 25

Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice (Jan. 28, 2000) 23

Brief *Amicus Curiae* for the American Civil Liberties Union (2000) 24

Brief of Benjamin Civiletti *Amicus Curiae* (Jan. 28, 2000) 23,24

Brief of Griffin B. Bell, et al., as *Amici Curiae* (Jan. 28, 2000) 23,24,25

Brief of United States, *Dickerson v. United States of America* (Jan. 2000) ..... *passim*

Articles

S. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1991) 22

Y. Kamisar, *Gates, "Probable Cause," "Good Faith" and Beyond*, 69 Iowa L. Rev. 551 (1984) 14

Miscellaneous

Controlling Crime Through more Effective Law Enforcement: Hearings on S. 300, S. 652, S. 580, S. 674, S. 675, S. 678, S. 798, S. 894, S. 916, S. 917, S. 922, S. 1007, S. 1094, S. 1194, S. 1333, S. 2050 Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Con. 1120 (1967) *19*

Hearings on the Supreme Court Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong. 25 (1968) .. 20

Letter of Attorney General William French Smith to the Honorable Strom Thurmond and the Honorable Joseph R. Biden, Jr., 5 O.L.C. 25 (Apr. 6, 1981) 2

Report to the Attorney General on the Law of Pre-Trial Interrogation, U.S. Dep't of Justice, Office of Legal Policy (Feb. 12, 1986) 3, 14

Taking Back Our Streets Act of 1995: Hearings on H.R. 3 Before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong. 343 (1995) 28

Testimony of Paul G. Cassell Before the Subcommittee on Criminal Justice Oversight of the Committee on the Judiciary, United States Senate, Concerning the Enforcement of 18 U.S.C. 3501, 1999 WL 16947869 (May 13, 1999) 3

INTEREST OF THE AMICUS CURIAE[1]

The Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully submits this brief as *amicus curiae* supporting affirmance of the judgment of the U.S. Court of Appeals for the Fourth Circuit.[2] The Bipartisan Legal Advisory Group and its predecessors have traditionally represented the institutional interests of the House in judicial proceedings, and have often appeared before this Court where such institutional interests are at stake.[3]

On November 1, 1999, the Attorney General notified the Speaker of the House of her determination that Section 3501 of Title 18 "cannot constitutionally authorize the admission of statements that would be excluded under the Supreme Court's holding in [*Miranda v. Arizona*, 384 U.S.

---

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel have made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to House Rule II(8), the Bipartisan Legal Advisory Group includes the Speaker of the House, the Majority Leader, the Majority Whip, the Minority Leader and the Minority Whip. The Minority Leader and the Minority Whip declined to support the filing of this brief.

[3] See, e.g., *Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997); *United States v. Eichman*, 496 U.S. 310 (1990); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Burke v. Barnes*, 479 U.S. 361(1987); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986); *Helstoski v. Meanor*, 442 U.S. 500 (1979); *United States v. Helstoski*, 442 U.S. 477 (1979).

436 (1966)]."[4] Acknowledging the "traditional practice of the Department of Justice in virtually all cases to defend the constitutionality of an Act of Congress unless it is plainly unconstitutional or an impermissible encroachment on the constitutional power of the Executive," the Attorney General nonetheless stated that the Justice Department would not defend the judgment of the court of appeals below upholding the constitutionality of Section 3501, but would ask this Court to grant *certiorari* and reverse that judgment.[5]

---

[4] The Attorney General's letter cited the notification requirements of Pub. L. No. 96-132, § 21(a)(2), 93 Stat. 1049-1050. Other statutes also impose notification requirements on the Attorney General when she declines to defend the constitutionality of an Act of Congress. *See* 2 U.S.C. § 130f(b) ("The Attorney General shall notify the General Counsel of the House of Representatives with respect to any proceeding in which the United States is a party of any determination by the Attorney General or Solicitor General not to appeal any court decision affecting the constitutionality of an Act or joint resolution of Congress within such time as will enable the House to direct the General Counsel to intervene as a party in such proceeding pursuant to applicable rules of the House of Representatives."); 2 U.S.C. § 288k(b) (same notification requirement with respect to Senate Legal Counsel). These provisions are designed to ensure that each House of Congress has an opportunity to protect its interest in defending the constitutionality of federal statutes, but they in no way approve or authorize any refusals to defend by the Justice Department. *See, e.g.*, H.R. Rep. 99-113 at 17 n.1 (1985) ("legislative history makes it clear that the [notification] provision was not intended to ratify the Department's refusal to enforce a statute . . . [but] to assure that Congress would receive early notification if the Department attempted to do so."); *id.* at 18 ("[S]ince all . . . statutes are presumed constitutional until judicially determined otherwise, the Attorney General may not refuse to enforce these statutes.").

[5] The Justice Department has stated that it "appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates the statute is invalid." Letter of Attorney General William French Smith to the Honorable Strom Thurmond and the Honorable Joseph R. Biden, Jr., 5 O.L.C. 25 (Apr. 6, 1981).

As the Fourth Circuit noted, the "Department of Justice's refusal to defend the constitutionality of an Act of Congress is an extraordinary event." J.A 184-85 n.14. Even more extraordinary--if not unprecedented--is the situation presented here, where the Justice Department is asking this Court to *reverse* the judgment of a court of appeals sustaining the constitutionality of a duly enacted Act of Congress which does not--and is not alleged to--infringe upon the executive power in any way.

The House has a well recognized institutional interest in defending the constitutionality of a duly enacted statute where the Justice Department refuses to do so. *See INS v. Chadha*, 462 U.S. 919, 940 (1983) ("We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional."). This interest is particularly strong where, as here, the Justice Department's refusal to defend flies in the face of the manifestly compelling arguments in support of the statute's constitutionality, arguments that were accepted by the Fourth Circuit below.[6]

---

[6] The constitutionality of Section 3501 has also been recognized by other lower courts, *see United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975) and *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997), and by the Justice Department itself. *See* U.S. Dep't of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pre-Trial Interrogation at 103 (Feb. 12, 1986), *reprinted in* 22 U. Mich. J. L. Reform 437 (1989) ("Since the Supreme Court now holds that *Miranda*'s rules are merely prophylactic, and that the Fifth Amendment is not violated by the admission of a defendant's voluntary statements despite non-compliance with *Miranda*, a decision by the Court invalidating this statute [Section 3501] would require some extraordinarily imaginative legal theorizing of an unpredictable nature."). On a number of occasions the Justice Department has argued to federal courts that unwarned custodial confessions may be admitted pursuant to Section 3501, including in the district court here. J.A. 175. *See generally* Testimony of Paul G. Cassell Before the Subcommittee on Criminal

To vindicate this interest and to protect the ability of Congress to enact future legislation in this area, the Bipartisan Legal Advisory Group respectfully submits this brief.

SUMMARY OF ARGUMENT

This case involves the constitutionality of 18 U.S.C. § 3501, which was enacted by Congress in 1968 as part of the Omnibus Crime Control and Safe Streets Act of 1968. Section 3501 is "the statute governing the admissibility of confessions in federal prosecutions." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994). In pertinent part Section 3501 provides that a confession "shall be admissible in evidence if it is voluntarily given" and specifies certain factors that the trial judge must consider in making the voluntariness determination, including, but not limited to, whether the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), were given. 18 U.S.C. §§ 3501(a),(b). The statute does not overrule *Miranda*'s legal conclusion that a confession produced as a result of the pressures of custodial interrogation may be compelled within the meaning of the Fifth Amendment, but simply ensures that all unwarned confessions are not automatically excluded from evidence.

The Fourth Circuit correctly held that Section 3501 is constitutional because the rule set forth in Miranda--that a confession obtained without the *Miranda* warnings is conclusively presumed involuntary and therefore inadmissible--is not required by the Constitution. J.A. 207. First, this Court's post-*Miranda* precedents clearly and repeatedly state that the *Miranda* warnings are recommended procedural safeguards, not constitutional requirements. Even more importantly, these precedents hold that an unwarned, but

---

Justice Oversight of the Committee on the Judiciary, United States Senate, Concerning the Enforcement of 18 U.S.C. 3501, 1999 WL 16947869 (May 13, 1999).

voluntary, confession may be used against a defendant for various purposes, including for impeachment, and that the fruits of such a confession may also be admitted. Since petitioner's confession was determined to be voluntary for purposes of admitting derivative evidence, it follows that admitting the confession pursuant to Section 3501 would not violate his constitutional rights.

Second, the *Miranda* decision itself does not hold that Congress lacks the authority to authorize the admission of unwarned, but voluntary, confessions. The language that the Justice Department relies upon to argue that *Miranda* limits future legislation is dicta, and the Justice Department's broad construction of that dicta is inconsistent with the presumption of constitutionality that is afforded to federal statutes. Moreover, the Justice Department's reading of *Miranda* would unnecessarily bring that case into conflict with this Court's later precedents. Under a proper reading of *Miranda*, Section 3501 can be upheld without "overruling" that case.

Miranda's rule of automatic exclusion is a conclusive presumption based upon the *Miranda* Court's empirical assessment of the coercive nature of custodial interrogation at the time of that decision. This conclusive presumption, however, is a rule of judicial convenience and efficiency, not a constitutional requirement. Moreover, in enacting Section 3501, Congress rejected *Miranda*'s empirical assessment of custodial interrogation, as it had the right to do. Thus, Section 3501's requirement of an individualized determination of voluntariness is clearly constitutional.

Finally, the policy arguments advanced by the Justice Department and others do not justify striking down Section 3501. In the first place, these arguments significantly misstate the costs and benefits of upholding Section 3501. Most importantly, they incorrectly assume that Section 3501 would lead to the abandonment, or at least the substantial modification, of current law enforcement practices with respect to providing *Miranda* warnings. In fact, Section 3501

would have no such effect. In the second place, policy concerns regarding the operation of Section 3501 are properly addressed to Congress, not the courts. Congress is the institution responsible for, and most capable of, balancing the need for extra-constitutional prophylactic measures to protect the rights of individuals against the need for effective law enforcement to protect the general public.

ARGUMENT

"Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal citations omitted) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). In undertaking this task, "the Court accords 'great weight to the decisions of Congress,'" recognizing that "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Columbia Broad. System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)); *see also United States v. Lopez*, 514 U.S. 549, 580 (1995) (noting "the circumspection with which we invalidate an Act of Congress") (Kennedy, J. concurring); *United States v. Watson*, 423 U.S. 411, 416 (1976) (noting that "there is a 'strong presumption of constitutionality due to an Act of Congress'") (quoting *United States v. Di Re*, 332 U.S. 581, 585 (1948)).

As the Fourth Circuit noted, the question of "[w]hether Congress has the authority to enact § 3501 . . . turns on whether the rule set forth by the Supreme Court in *Miranda* [that an unwarned confession is automatically inadmissible] is required by the Constitution." J.A. 201. If the answer is yes, Section 3501 is unconstitutional as applied to unwarned custodial confessions such as petitioner's. If the

answer is no, Section 3501 is clearly valid as an exercise of Congress' "plenary authority over the promulgation of evidentiary rules for the federal courts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976); *see also Vance v. Terrazas*, 444 U.S. 252, 265-66 (1980) (Congress' power "to prescribe rules of evidence and standards of proof in the federal courts . . ., rooted in the authority of Congress conferred by Art. 1, § 8, cl. 9 of the Constitution to create federal courts, is undoubted and has been frequently noted and sustained.").

I. BECAUSE *MIRANDA*'S RULE THAT AN UNWARNED CONFESSION IS AUTOMATICALLY INADMISSIBLE IS NOT REQUIRED BY THE CONSTITUTION, SECTION 3501 CAN BE UPHELD WITHOUT "OVERRULING" *MIRANDA*

A. This Court's Post-*Miranda* Jurisprudence Establishes that the Constitution Does Not Require the Exclusion of Unwarned, but Voluntary, Statements

If the *Miranda* Court had held that the Constitution required the exclusion of all unwarned custodial confessions, then Section 3501 could not be constitutionally applied to admit petitioner's confession without overruling *Miranda*. As the Fourth Circuit pointed out, the *Miranda* decision itself is opaque as to the precise basis for its requirement that unwarned confessions be excluded from evidence, although the better reading of *Miranda* is that this requirement is a judicially-created, non-constitutional, rule designed to "allow the Court to avoid the constitutional issues associated with state interrogations." J.A. 203. This reading of *Miranda* is strongly supported by the fact that the Court explicitly invited Congress and the States to modify this rule by legislation.

Miranda, 384 U.S. at 467, 490.

The Court's post-*Miranda* jurisprudence, moreover, eliminates any ambiguity on this point and clearly establishes that the procedural safeguards set forth in *Miranda* are not constitutionally required and that unwarned, but voluntary, confessions may constitutionally be admitted into evidence. *See, e.g., Davis v. United States*, 512 U.S. 452, 457 (1994) ("The right to counsel established in *Miranda* was one of a 'series of recommended 'procedural safeguards' . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'") (quoting *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) ("The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution . . .'") (quoting *Michigan v. Tucker*); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (same); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . may be triggered even in the absence of a Fifth Amendment violation [and] [t]hus, in the individual case, *Miranda*'s preventive medicine provides a remedy to the defendant who has suffered no identifiable constitutional harm."); *see also Withrow v. Williams*, 507 U.S. 680, 702 (1993) ("the exclusion of statements obtained in violation of *Miranda* is not constitutionally required.") (O'Connor, J., concurring in part and dissenting in part); *Duckworth*, 492 U.S. at 209 ("The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself.") (O'Connor, J., concurring).

The Justice Department acknowledges that "the language used in *Tucker* and its progeny that a violation of *Miranda* is not itself a violation of the Constitution could be read to support an inference that *Miranda* is not a constitutional rule." Brief of the United States at 23. However, it is not merely the language of these cases, but their square holdings, that compels this conclusion. Thus, the

Court has held that unwarned confessions may be used for impeachment and that evidence derived from such unwarned confessions may be admitted. *See Elstad*, 470 U.S. at 305-06; *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975). Similarly, in *New York v. Quarles*, 467 U.S. 649 (1984), the Court held that a "public safety" exception to the *Miranda* exclusionary rule allowed the admission of an unwarned confession resulting from questioning a suspect about the location of a gun. The Court concluded that the "need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. Absent evidence of "actual coercion" that would violate the Fifth Amendment, "there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind." *Id.* at 658 n.7. Thus, the mere fact that *Miranda* warnings were not given did not establish that the confession was involuntary, *id.* at 655 n.5, and there was no constitutional prohibition against the admission of an unwarned, but voluntary, confession.

It is true, as the Justice Department points out, that, apart from *Quarles*, the post-*Miranda* cases continue to adhere to *Miranda*'s rule that unwarned confessions are inadmissible in the prosecution's case-in-chief. *See* Brief of the United States at 39. But this observation begs the question of whether the Constitution requires the *Miranda* rule in the first place. Indeed, while the Justice Department describes the dichotomy in this Court's cases--unwarned, voluntary confessions may be used for impeachment or for derivative evidence, but may not generally be used in the prosecution's case-in-chief--it does not explain how that dichotomy can be justified as a constitutional requirement. After all, a statement compelled in violation of the Fifth Amendment cannot be used for any purpose, including

impeachment or derivative evidence.[7] Since in this case petitioner's statements have been determined to be voluntary, and therefore usable against him for purposes of admitting evidence derived therefrom, J.A. 211-12, it follows inexorably that the use of those statements against him in the prosecution's case-in-chief would not violate his constitutional rights.

B. *Miranda*'s Statements Regarding the Minimum Requirements for Future Legislation Are Dicta

The Justice Department contends that because *Miranda* is a "constitutional decision" or a decision of "constitutional dimension," it controls the outcome of this case unless this Court "overrules" *Miranda*.[8] However, while *Miranda* was designed to protect the Fifth Amendment right against self-incrimination, it is clear--as the Justice Department acknowledges–"that the procedural safeguards articulated in *Miranda* are not themselves required by the Constitution and that a violation of *Miranda*'s prophylactic rules does not necessarily produce statements that are themselves 'compelled.'" Brief of United States at 40. The

---

[7] *See New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979) (testimony compelled under grant of immunity cannot be used for impeachment); *Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978) (involuntary confession cannot be used for impeachment); *Kastigar v. United States*, 406 U.S. 441 (1972) (fruits of testimony compelled under grant of immunity cannot be admitted into evidence). Even if there were some constitutional distinction between the different uses of compelled testimony, that distinction would not explain this Court's ruling in *Quarles*. There is no "public safety" exception to the Fifth Amendment.

[8] *See* Brief for the United States at 8 (*Miranda* is a "constitutional decision"), *id.* at 9, 29 (*Miranda* is of "constitutional dimension"); *id.* at 7 (*Miranda* is a "constitutionally based ruling); *id.* at 8 & 25 (*Miranda* is "constitutional in nature"); *id.* at 23, 24, 26, 29 (*Miranda* rests on a "constitutional basis" or "constitutional grounds").

question presented here--whether Congress is constitutionally prohibited from providing for the admission of unwarned confessions which are not actually "compelled" in violation of the Fifth Amendment-- was simply not before the *Miranda* Court. If anything, *Miranda* made it clear that the rules laid down in its decision could be altered by subsequent state or federal legislation, and stated that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect." *Miranda*, 384 U.S. at 467.

The Justice Department--like others supporting petitioner--argues that *Miranda* limits future acceptable legislation to that which is "fully as effective" or "at least as effective" as the *Miranda* rules "in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." Brief of United States at 27 (quoting *Miranda*, 384 U.S. at 467, 490). It contends that Section 3501 fails to meet this "constitutional standard of adequacy stated in *Miranda*" and thus the statute must be struck down unless *Miranda* is "overruled." Brief of United States at 28-29.

However, whatever interpretation may be placed on the "fully as effective" language from the *Miranda* decision, it is clear that this language in no sense constituted part of the holding of that case.[9] It is pure dicta, designed to provide guidance to the legislatures as the Court "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our

---

[9] *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) ("It is a maxim, not be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.") (Marshall, C.J.).

criminal laws."[10] *Miranda*, 384 U.S. at 467. The Justice Department's approach--giving this guidance the status of a holding that requires the invalidation of Section 3501--would be inconsistent not only with *Miranda*'s disavowal of an intent to create a "constitutional straitjacket,"[11] but with this Court's careful and circumspect approach to passing on the constitutionality of an Act of Congress.

Moreover, applying the *Miranda* dicta in the context of Section 3501 is problematic because the *Miranda* Court was envisioning legislation that sought to replace the warnings with a set of alternative safeguards to protect the privilege. Section 3501, however, does not seek to supercede or replace the practice of giving warnings--a practice that was followed by federal law enforcement even before the *Miranda* decision. *See Miranda*, 384 U.S. at 483-86. Instead, Section 3501 modifies the consequences of a "technical" failure to give warnings--*i.e.*, a failure that does not result in an actual constitutional violation--by providing that such a failure does not automatically lead to the exclusion of the unwarned confession.[12] Section 3501 provides a series of objective

---

[10] The Court has already rejected other dicta in the *Miranda* opinion. *See Harris v. New York*, 401 U.S. 222, 224 (1971) ("Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.").

[11] Cf. Smith v. Robbins, 120 S. Ct. 746, 757 (2000) (refusing to adopt an interpretation of *Anders v. California*, 386 U.S. 738 (1967) which would "convert[] it from a suggestion into a straitjacket [that] would contravene this Court's established practice of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult policy problems.").

[12] As Justice O'Connor has pointed out, many--if not most--*Miranda* violations present precisely such technical issues:

factors (including whether the *Miranda* warnings were given) to guide the trial court in making the determination of admissibility, but still leaves the trial court with ample flexibility to exclude any unwarned confessions that were obtained in violation of the defendant's constitutional rights.[13] Such a statutory procedure, which is "fully effective" to protect a suspect's constitutional rights, was not involved in

---

> In case after case, the courts are asked on habeas to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. Whether the suspect was "in custody," whether or not there was "interrogation," whether warnings were given or were adequate, whether the defendant's equivocal statement constituted an invocation of rights, whether waiver was knowing and intelligent--this is the stuff that *Miranda* claims are made of. While these questions create litigable issues under *Miranda*, they generally do not indicate the existence of coercion--pressure tactics, deprivations, or exploitations of the defendant's weaknesses--sufficient to establish involuntariness.

Withrow v. Williams, 507 U.S. at 709-710 (O'Connor, J., concurring in part and dissenting in part) (footnotes omitted).

[13] *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2282 ("[The proposed statute] would avoid the inflexible rule of excluding such statements *solely* on technical grounds such as delay or failure to warn the accused as to his rights to silence or to counsel. We have not nullified, however, the rights of defendants to the safeguards of federal law or the Constitution. On the contrary, we have provided a more reasonable rule in that the judge shall consider all the defendant's rights . . . and their possible violation in deciding as to the voluntariness of the confession and thus its admissibility.") (Individual Views of Messrs. Dirksen, Hruska, Scott and Thurmond) (emphasis in original).

Miranda, nor directly addressed by the Court even in dicta.[14]

In the final analysis, the Justice Department postulates an irreconcilable "tension" between *Miranda* and the post-*Miranda* case law. Brief of the United States at 39. This "tension," of course, is eliminated simply by acknowledging--as the Justice Department has in the past--that *Miranda*'s exclusionary rule is not constitutionally required.[15] *Miranda* can and should be construed so as to avoid such tension. In any event, if the tension existed, principles of *stare decisis* would not foreclose this Court from deciding the case is such

---

[14] The Justice Department strains mightily to conclude that the listing of factors in Section 3501(b) made no change from pre-*Miranda* voluntariness law. Brief of United States at 15-18. However, the fact that each of the listed factors had been considered (or at least mentioned) in prior cases proves nothing because under pre-*Miranda* law "[a]lmost everything was relevant, but almost nothing was decisive." Y. Kamisar, *Gates, "Probable Cause," "Good Faith" and Beyond*, 69 Iowa L. Rev. 551, 570 (1984). By contrast, Section 3501 identifies a limited number of objective factors which, if not necessarily decisive, would (if they weighed against the prosecution) at least create a heavy presumption of involuntariness without any specific proof of coercion. Thus, it is entirely reasonable to read Section 3501 as more protective of Fifth Amendment rights than was pre-*Miranda* law, a reading that would be consistent with the well-established proposition that statutes must be construed to avoid constitutional doubt. *See Dep't of Commerce v. U.S. House of Representatives*, 119 S.Ct. 765, 781 (1999) (Scalia, J., concurring); *Edward J. Bartolo Corp. v. Florida Gulf Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[15] *See* Brief of the United States as Amicus Curiae Supporting Petitioner at 9; *Withrow v. Williams*, 507 U.S. 680, 706-07 (1993) (No. 91-1030) ("*Miranda*'s prophylactic rules lead to the exclusion of highly probative evidence not obtained in violation of the Constitution"); *id.* at 14 ("'[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment'") (citing *Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring)); *see also* U.S. Dep't of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pre-Trial Interrogation at 103 (Feb. 12, 1986), reprinted in 22 U. Mich. J.L. Reform 437 (1989).

a way as to resolve that tension. *See Church of the Lukumi Babali Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring). Since the application of Section 3501 to admit petitioner's confession would not actually violate the Constitution, the statute should be upheld. No principle of this Court's flexible doctrine of *stare decisis* requires *extending* a precedent to invalidate a duly enacted Act of Congress which does not in fact violate the Constitution.

II. *MIRANDA*'S CONCLUSIVE PRESUMPTION THAT CUSTODIAL INTERROGATIONS ARE INHERENTLY COERCIVE IS NOT DICTATED BY THE CONSTITUTION AND WAS NOT BINDING ON CONGRESS

A. *Miranda*'s Conclusive Presumption Is a Rule of Convenience, Not a Constitutional Requirement

Since *Miranda* clearly did not hold that all unwarned confessions were actually involuntary, the most reasonable interpretation of *Miranda* is that its rule of automatic exclusion is a rule of judicial convenience, based on the difficulty of determining whether an unwarned confession was in fact voluntary. By conclusively presuming that unwarned confessions are involuntary, *Miranda* enabled courts to avoid "spending countless hours reviewing the facts of individual custodial interrogations." *Quarles*, 467 U.S. at 683 (Marshall, J., dissenting).[16] This is consistent with the

---

[16] *See also Quarles*, 467 U.S. at 683 (Marshall, J., dissenting) ("In practice [the pre-*Miranda*] courts found it exceedingly difficult to determine whether a given confession had been coerced. Difficulties of proof and subtleties of interrogation technique made it impossible in most cases for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled."); *see id.* at 684 n.7 (acknowledging that

purpose of all conclusive presumptions, which are simply "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 723 (1991).

As the Fourth Circuit noted, however, such "conclusive presumptions, like the one contained in *Miranda*, are dictated by convenience, not the Constitution." J.A. 207 n.20. Thus, even if most custodial interrogations did involve inherent coercion, it would be within Congress's power to require an individualized determination as to whether a particular interrogation involved sufficient coercion to render a confession involuntary.

Moreover, this Court's post-*Miranda* cases clearly establish that the conclusive presumption is not constitutionally required. These cases demonstrate that the courts do not need a conclusive presumption in order to distinguish between unwarned, but voluntary confessions, on the one hand, and those which are involuntary, on the other. *See, e.g., Elstad*, 470 U.S. at 305-06; *Quarles*, 467 U.S at 657-58; *Tucker*, 417 U.S. at 443-44. If a conclusive presumption is neither necessary nor appropriate when evaluating the voluntariness of an unwarned confession for purposes of impeachment or derivative evidence (or in the context of the "public safety" exception), it cannot be otherwise with respect to considering the admissibility of the very same confession in the prosecution's case-in-chief.

"*Miranda* was overbroad in that its application excludes some statements made during custodial interrogations that are not in fact coercive").

B. In Enacting Section 3501, the 1968 Congress Rejected *Miranda*'s Empirical Assessment of Custodial Interrogation

Apart from its non-constitutional status, a conclusive presumption is based on an empirical assessment of the likelihood that it will result in the correct outcome in the large majority of cases. *See Coleman*, 501 U.S. at 737 ("*Per se* rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time."). Thus, the *Miranda* Court made clear that the rule it announced was premised on a specific understanding of custodial interrogation as it was practiced at that time. *See Miranda*, 384 U.S. at 445 ("An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today."). After surveying various accounts of police brutality and abuses, the Court noted that "[u]nless a proper limitation upon custodial interrogation is achieved--such as these decisions will advance--there can be no assurance that practices of this nature will be eradicated in the foreseeable future." *Id.* at 447. The Court then reviewed various police manuals to identify commonly used psychological techniques designed to pressure or trick suspects into confessing. *Id.* at 447-55. Finally, the Court adopted the warnings, enforced by a rule of automatic inadmissibility, as its "solution for the inherent compulsions of the interrogation process as it is presently conducted." *Id.* at 467.

In enacting Section 3501, Congress did not reject *Miranda*'s interpretation of the Fifth Amendment, but did reject *Miranda*'s empirical assumption that most custodial interrogations involve sufficient pressure to render resulting confessions involuntary. In this connection the Senate Judiciary Committee report pointed out the superior ability of

the legislative branch to find facts and make broad policy decisions in this area, noting that the *Miranda* "Court's invitation for Congress to act could stem from a widespread notion that Congress is better able to cope with the problem of confessions than is the Court."[17] The report specifically criticized the sketchy basis upon which the *Miranda* Court had based its factual assumptions, noting that "[e]xamples of presumed police practice and data supporting the conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed."[18]

---

[17] *See* S. Rep. No. 90-1097 (1968) at 46, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2132. Various witnesses testified before the Senate Special Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary in support of this proposition. For example, Chief Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit testified:

> The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.

Id. at 46, 1968 U.S.C.C.A.N. at 2133. California Attorney General Thomas C. Lynch similarly stated that "[I]t seems to me that the Court has implicitly acknowledged that Congress, with its vastly superior fact-finding powers, is in a much better position than the Court to formulate standards most likely to result in a correct determination, in a given case, of the issue of voluntariness of a confession." *Id.* at 47, 1968 U.S.C.C.A.N. at 2133.

[18] S. Rep. No. 90-1097 (1968) at 55, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2142. This view echoed that expressed by Justice White in his *Miranda* dissent. *See Miranda*, 384 U.S. at 532-33 (The Court "extrapolates a picture of what it conceives to be the norm from police

The Senate Judiciary Committee report cited the testimony of witnesses with extensive knowledge of law enforcement practices and methods of custodial interrogation. For example, then-District Attorney (now U.S. Senator) Arlen Specter "pointed out that the so-called third degree methods deplored by the Supreme Court and cited as a basis for their opinion in *Miranda* is not a correct portrayal of what actually goes on in police stations across the country."[19] Quinn Tamm, the executive director of the International Association of Chiefs of Police, likewise stated that while such coercive "practices might have been approved 30 years ago, they have no place in modern police techniques."[20] Thus, coercive practices in police interrogations constituted the "exception rather than the rule," and the Senate Judiciary Committee concluded that custodial interrogations were not in fact inherently coercive.[21]

---

investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. . . . Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.") (White, J., dissenting).

[19] S. Rep. No. 90-1097 (1968) at 47-48, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134.

[20] S. Rep. No. 90-1097 (1968) at 48, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134.

[21] S. Rep. No. 90-1097 (1968) at 48, 60 *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134, 2137-38. Other witnesses who testified also suppor.. 1 the view this conclusion as to the nature of custodial interrogations. *See, e.g., Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 922, S. 1007, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary* ("Senate Hearing") , 90th Cong. 1120-23 (1967) (Statement of

The Senate Judiciary Committee recognized that opponents of the legislation had expressed the view that it would be found unconstitutional as violating *Miranda*.[22] However, the Committee stated that "it is constitutionally permissible for Congress to formulate a test of admissibility different from that adopted by the Court, inasmuch as the adoption does not follow upon any attempt to change constitutional theory but rather upon a qualifying of the factual basis of the effectuation of that policy."[23]

As this Court has noted, "[w]hen Congress makes findings on essentially factual issues . . ., those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass the vast amounts of data bearing on such an issue." *Walters*, 473 U.S. at 330 n.12; *see also Rostker*, 453 U.S. at 82-83 (in evaluating constitutionality of a statute, "[t]he District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence."). It would be wholly inconsistent with this deferential approach to disregard the factual findings underlying Section 3501 merely because they were inconsistent with the *Miranda*

Frank S. Hogan, New York County District Attorney).

[22] S. Rep. No. 90-1097 (1968) at 51, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2147.

[23] S. Rep. No. 90-1097 (1968) at 63, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2150; *see also Hearings on the Supreme Court Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong. 25 (1968) ("A decision of the Supreme Court, if it is based on a factual assumption which is incorrect, may be subject to Congress' power to legislate") (remarks of Senator Ervin) (*quoted in* J.A. 209-10 n.22).

Court's prior assessment of custodial interrogations.[24]

As the Justice Department concedes, the factual premises of *Miranda* were debatable at the time that case was decided. *See* Brief of United States at 47. Our purpose here is not to criticize *Miranda*'s fact-finding methodology or conclusions, or even to contend that the 1968 Congress's conclusions were necessarily superior. We do, however, strongly dispute the view that the judiciary, simply by making broad and debatable factual assumptions or judgments about the nature of custodial interrogations, can somehow cut off the constitutional authority of the legislative branch to conduct its own inquiry on the matter, reach different conclusions, and legislate on that basis.

C. The 1968 Congress's Legal Disagreement With *Miranda* Is Irrelevant

Although many legislative supporters of Section 3501 disagreed vehemently with the legal reasoning of *Miranda*, Section 3501 does not--as noted by the Senate report--attempt to overrule *Miranda*'s "constitutional theory." For example, Section 3501 does not contradict *Miranda*'s legal conclusion that the right against self-incrimination applies to custodial interrogations. Nor does Section 3501 contradict *Miranda*'s conclusion that the pressures of custodial interrogation can, even in circumstances falling short of physical coercion or "third degree" tactics, violate that right. Instead, Section 3501 simply seeks to ensure that clearly voluntary statements are not excluded from evidence solely because of a failure to give Miranda warnings.

The Justice Department and other parties supporting petitioner suggest that the 1968 Congress acted in a reckless

---

[24] Cf. Wallace v. Jafree, 472 U.S. 38, 99 (1985) ("*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history") (Rehnquist, J., dissenting).

and politically-motivated disregard of this Court's final authority to interpret the Constitution.[25] As noted earlier, however, objections to the constitutionality of Section 3501 were debated by the Congress, and a considered response was offered by the statute's proponents. Thus, "[t]he customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker*, 453 U.S. at 64. In any event, the validity of Section 3501 ultimately depends on whether it was within Congress's constitutional authority, not upon the wisdom of the statute or the motives of its proponents.

---

[25] For example, the House Democratic Leadership, as *amicus curiae*, expresses the view that "Congress enacted section 3501 largely for symbolic purposes, to make an election-year statement in 1968 about law and order, not to mount a challenge to *Miranda*." *Brief Amicus Curiae* of the House Democratic Leadership at 8; *see also id.* at 5, 9-10, 13, 19, 22. Even if this view were correct, it would have absolutely no bearing on the meaning or the constitutionality of Section 3501. *See generally* S. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 865-66 (1991) (explaining the difference between legislative purpose and the personal or political motives that may cause a legislator to vote for a particular bill); *cf. Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472 n.7 (1981) ("'[I]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive'") (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). We are aware of no authority--and the House Democratic Leadership cites none--for the proposition that a duly enacted Act of Congress may be disregarded or struck down because it was intended to be "symbolic" or because political considerations played a role in its passage.

III. THE POLICY OBJECTIONS TO SECTION 3501 DO NOT CONSTITUTE A BASIS FOR INVALIDATING THE STATUTE

Much of the Justice Department's attack on Section 3501 is based on its clearly stated policy concerns about the effect that the statute would have on law enforcement and the criminal justice system. *See* Brief of the United States at 29-50. In brief, the Justice Department argues that *Miranda*'s "core procedures are not difficult to administer," that "*Miranda* has proved workable in practice and is in many respects beneficial to law enforcement," and that *Miranda* "provides bright-line rules that can be readily applied by the police and the courts to a large variety of factual circumstances." *Id.* at 33-34. Other parties supporting petitioner echo these sentiments.[26]

At the outset, we do not believe that dressing these concerns in the rubric of *stare decisis* alters their nature as policy, rather than constitutional, considerations. It is worth noting, however, that the Justice Department significantly overstates the costs, and understates the benefits, of upholding Section 3501. We also believe that the concerns raised by the Justice Department and other parties supporting petitioner argue in favor of recognizing the congressional prerogative to legislate in this area, rather than leaving the issue of the admissibility of custodial confessions solely to the judiciary's case-by-case adjudication.

---

[26] *See, e.g.*, Brief of Griffin B. Bell, et al., as *Amici Curiae* at 6-22; Brief of Benjamin Civiletti *Amicus Curiae* at 5-6; Brief *Amici Curiae* of the National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice at 21-24.

A. The Justice Department and Others Misstate the Costs and Benefits of Section 3501

The alleged "cost" of sustaining the constitutionality of Section 3501 is based almost entirely on the assumption that it would lead to the abandonment, or at least the substantial modification, of current law enforcement practices with respect to providing *Miranda* warnings. Yet it seems clear--indeed virtually undisputed--that Section 3501 would have no such effect. In the first place, as the Fourth Circuit noted, law enforcement has a strong incentive to give the *Miranda* warnings under Section 3501 because providing those warnings "is still the best way to guarantee a finding of voluntariness." J.A. 211.[27] In the second place, as the Justice Department explicitly acknowledges, federal law enforcement agencies would continue to require *Miranda* warnings if Section 3501 were upheld--an assertion which is given added credibility by the fact that they provided such warnings even before *Miranda* was decided. *See* Brief of United States at 49

[27] It could be suggested that Section 3501 provides a slightly greater incentive to law enforcement officials not to give *Miranda* warnings because an unwarned confession might be admissible in the prosecution's case in chief. However, as numerous *amici* point out, the uncertainty of whether such a confession would ultimately be determined to be voluntary would be very high. *See* Brief for *Amicus Curiae* The American Civil Liberties Union at 5-7; Brief of Griffin Bell, *et al.*, as *Amici Curiae* at 11-15; Brief of Benjamin Civiletti *Amicus Curiae* at 5-6. Moreover, a law enforcement officer who deliberately failed to give warnings when they were required would risk not only administrative discipline and penalties, but also civil liability in the event an involuntary confession was procured. *See, e.g., California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *amended by*, _ F.3d _, 2000 WL 1639 (9th Cir. Jan. 3, 2000). Thus, while some incentive to fail to give warning exists even under the Court's *Miranda* jurisprudence (since unwarned confessions may be used for impeachment or derivative evidence), any additional incentive provided by Section 3501 would seem to be negligible at best.

n.37. Finally, even if the Justice Department were concerned that federal law enforcement personnel would fail to give *Miranda* warnings absent the threat of automatic inadmissibility (a concern which it does not raise and which seems implausible), nothing in Section 3501 requires the Justice Department to offer into evidence statements which were obtained in deliberate violation of law enforcement policy.[28]

The only other "cost" of upholding Section 3501 is suggested by the brief of former Attorney General Bell and others. These *amici* suggest that Section 3501 would encourage courts, regardless of whether or not *Miranda* warnings are given, to scrutinize police methods to determine "whether the suspect's decision to talk was truly voluntary." Brief of Griffin B. Bell, *et al.*, as *Amici Curiae* at 16. The implication is that under current law the courts suppress

[28] The Justice Department asserts that it is unable to predict whether state and local law enforcement would continue the policy of giving *Miranda* warnings if Section 3501 were upheld. *See* Brief of the United States at 49 n.37. This concern, however, would only be an issue in states which adopt statutes similar to Section 3501; apparently only Arizona has done so to date. In contrast, a number of states have adopted, as a matter of state law, rules that are identical to or more stringent than those applicable under *Miranda* and its progeny. *See State v. Valera*, 74 Haw. 424, 848 P.2d 376, 380 (1993) ("[W]e have consistently provided criminal defendants with greater protection under Hawaii's version of the privilege against self-incrimination . . . than is otherwise ensured by the federal courts under *Miranda* and its progeny."); *State v. Randolph*, 179 W.Va. 546, 370 S.E.2d 741, 743 (1988) (holding that, notwithstanding *Colorado v. Spring*, 479 U.S. 564 (1987), state law dictated the conclusion that a suspect who was not informed of the nature of the charges against him had not knowingly and intelligently waived his *Miranda* rights). Moreover, to the extent that states do enact analogues to Section 3501, there is every reason to believe that state and local law enforcement would continue to give *Miranda* warnings. *See generally* Brief *Amici Curiae* of Americans for Effective Law Enforcement, Inc., Joined by the International Association of Chiefs of Police, Inc., the National Sheriffs' Association and the Virginia Association of Chiefs of Police.

unwarned confessions, whether voluntary or involuntary, but admit warned confessions without determining if they are actually voluntary. If that be so, it is not clear why this demonstrates the superiority of the *status quo*. In any event, the Court should reject the argument that Congress should not be allowed to legislate lest it cause the judiciary to adjudicate.

With respect to the benefits of upholding Section 3501, the Justice Department admits that "[t]here is no doubt that the public pays a heavy price if technical violations of *Miranda* result in suppression of otherwise probative evidence, and non-prosecution or acquittal of felons ensues." Brief of the United States at 50. However, the Justice Department contends that the *Miranda* doctrine is generally workable, and suggests that the Court has in the past made--and can continue to make in the future--needed modifications to improve the functioning of the doctrine. *Id.* at 35-36. In fact, the Justice Department identifies several areas where it believes that modifications to the *Miranda* doctrine are needed; for example, it indicates that it will ask the Court for a "good faith" exception to the *Miranda* exclusionary rule for situations where officers inadvertently fail to give *Miranda* warnings. *Id.* at 36 n.26.

While the Justice Department may be correct that *Miranda* is "generally workable," it seems clear that there are a significant number of cases--including the present case--where technical violations can lead to exclusion of probative evidence. *See generally Withrow*, 507 U.S. at 709 ("[C]ertainly it is reasonable to suppose that most technical errors in the administration of *Miranda*'s warnings are just that.") (O'Connor, J., dissenting in part and concurring in part); *id.* ("In case after case, the courts are asked on habeas to decide purely technical *Miranda* questions that contain not even a hint of police overreaching."). Section 3501 is designed to deal with precisely those cases. Section 3501 thus will provide the very modifications that the Justice Departments says are needed to ensure that the public does

not unnecessarily pay a "heavy price" with respect to the prosecution of dangerous criminals. *See Davis*, 512 U.S. at 465 (The Justice Department's refusal to invoke Section 3501 "may have produced--during an era of intense national concern about the problem of runaway crime--the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens.") (Scalia, J., concurring).

B. Congress Has the Institutional Capability to Make Rules Governing Custodial Interrogations

The Justice Department suggests that although Congress presumably has the power to enact some alternative procedure to the *Miranda* warnings, it lacks the authority to legislate the very changes in the application of the *Miranda* doctrine that the Justice Department contends the Court itself can and should make. Not only does this suggestion make little sense, it ignores Congress's "creative rule-making capacit[y]" recognized by the *Miranda* Court itself. *Miranda*, 384 U.S. at 467.[29] This capacity gives the Congress significant advantages over the judiciary when it comes to designing rules of general applicability designed to govern the conduct of custodial interrogations.

As noted earlier, Congress has the ability to obtain information from a much wider spectrum of sources than does the judiciary. Congress can hear not only from prosecutors and defense counsel, but from others such as police officers, crime victims, and persons who have been subjected to

---

[29] *See also Miranda*, 384 U.S. at 524 (Harlan, J., dissenting) (noting that "legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.").

coercive interrogation. Through its committee process, Congress can fully explore related issues such as the effect of *Miranda* requirements on police training and procedures, the use of new technology to protect suspect's rights, and the extent to which *Miranda* may in different situations "overprotect" or "underprotect" the constitutional right against self-incrimination.[30] In light of its superior fact-finding powers and its democratic accountability, Congress is clearly the institution most capable of balancing the need for extra-constitutional prophylactic measures to protect the rights of individuals against the need for effective law enforcement to protect the general public.[31]

The Justice Department argues, however, that "overruling" *Miranda* would "undermine public confidence in the fairness" of the criminal justice system because "*Miranda* has come to play a unique and important role in the

---

[30] For example, several years ago Congress held hearings on possible modifications of the exclusionary rule. *See Taking Back Our Streets Act of 1995: Hearings on H.R. 3 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 343-408 (1995).

[31] *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (holding that Congress could supplant a judicially-created remedy for unconstitutional deprivation of welfare benefits because "[w]hether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program"); *Bush v. Lucas*, 462 U.S. 367, 389 (1982) (Congress is "in a far better position than a court" to determine the appropriate remedy for violations of the First Amendment rights of government employees because "[n]ot only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."); *see generally Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 865 (1986) ("The ordering of competing social policies is a quintessentially legislative function."); *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (The "balancing of competing values and interests . . . in our democratic system is the business of elected representatives.").

nation's conception of [that system]." Brief of the United States at 49. Similarly, *amici* argue that *Miranda* warnings "have permeated our mass culture" because "[e]very Hollywood crime drama and television police show that depicts an arrest shows the officer warning the arrestee of his rights in accordance with *Miranda*." Brief of Griffin B. Bell, et al., as *Amici Curiae* at 3, 23.

These arguments are flawed, of course, because affirming the Fourth Circuit's judgment in this case requires neither the "overruling" of *Miranda* nor the abandonment of *Miranda* warnings. More fundamentally, however, *Miranda*'s celebrity does not somehow elevate it above the Constitution or normal principles of jurisprudence. This Court should not abandon its traditional approach to passing upon the constitutionality of Acts of Congress based on such novel arguments.

CONCLUSION

For the reasons set forth herein, the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully requests that the Court affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

GERALDINE R. GENNET
General Counsel
KERRY W. KIRCHER
Deputy General Counsel
MICHAEL L. STERN*
Senior Counsel
CAROLYN BETZ
Assistant Counsel

Office of General Counsel
United States House of
Representatives
Washington, D.C. 20015
(202) 225-9700

Counsel for *Amicus Curiae*

March 9, 2000

*Counsel of Record

Mar 9 2000

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* MANNING & MARDER, KASS, ELLROD, RAMIREZ IN SUPPORT OF THE JUDGMENT BELOW

DAVID J. WILSON
LAW OFFICES OF
MANNING & MARDER,
KASS, ELLROD, RAMIREZ
707 Wilshire Boulevard, 45th Floor
Los Angeles, California 90017
(213) 624-6900
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

24pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

1. The Fictional "Bright Line" of *Miranda* Is No Bright Line at All 3

2. *Miranda* Is Not a Substitute for the Voluntariness Inquiry, but an Additional Inquiry, Requiring Additional Litigation 7

3. Assuming *Miranda's* Premises and Conclusions Once Were Supported by Precedent or by Logic, Subsequent Developments Have Revealed *Miranda's* Fallacies 11

4. Upholding Section 3501 Will Not Undermine Confidence in the Judicial System 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 9, 13
Arizona v. Roberson, 486 U.S. 675 (1988) 5
Ashcraft v. Tennessee, 322 U.S. 143 (1944)..... 12
Berkemer v. McCarty, 468 U.S. 420 (1984).....8, 16
Blackburn v. Alabama, 361 U.S. 199 (1960)..... 12
Bram v. United States, 168 U.S. 532 (1897) 12, 13
Chambers v. Florida, 309 U.S. 227 (1940)..... 12
Colorado v. Connelly, 479 U.S. 157 (1986).....9, 10, 13
Delaware v. Van Arsdall, 475 U.S. 673 (1986) 10
Edwards v. Arizona, 451 U.S. 477 (1981)..... 5
Escobedo v. Illinois, 378 U.S. 478 (1964) 11, 12
Harris v. New York, 401 U.S. 222 (1971).....6, 16
Haynes v. Washington, 373 U.S. 503 (1963) 12
Illinois v. Perkins, 496 U.S. 292 (1990)..... 15
Johnson v. New Jersey, 384 U.S. 719 (1966) 12
Kirby v. Illinois, 406 U.S. 682 (1972) 12, 16
Lynumn v. Illinois, 372 U.S. 528 (1963)..... 12
Massiah v. United States, 377 U.S. 201 (1964)..... 6
McNeil v. Wisconsin, 501 U.S. 171 (1991).....6, 19
Michigan v. Harvey, 494 U.S. 344 (1990)..... 7
Michigan v. Jackson, 475 U.S. 625 (1986)..... 6
Michigan v. Mosely, 423 U.S. 96 (1975).....5, 15

TABLE OF AUTHORITIES – Continued

Page

Michigan v. Tucker, 417 U.S. 433 (1974) 6, 16
Miller v. Fenton, 474 U.S. 104 (1985)..... 8
Minnick v. Mississippi, 498 U.S. 146 (1990) 5
Miranda v. Arizona, 384 U.S. 436 (1966)..... *passim*
Moran v. Burbine, 475 U.S. 412 (1986).....6, 12
Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 12
New York v. Quarles, 467 U.S. 649 (1984).....8, 14, 17
North Carolina v. Butler, 441 U.S. 369 (1979) 15
Oregon v. Bradshaw, 462 U.S. 1039 (1983) 5
Oregon v. Elstad, 470 U.S. 298 (1985) .. 4, 6, 7, 8, 13, 17
Oregon v. Hass, 420 U.S. 714 (1975).....6, 10
Payne v. Tennessee, 501 U.S. 808 (1991)..... 18
Pennsylvania v. Muniz, 496 U.S. 582 (1990)..... 4
People v. Krom, 461 N.E.2d 276 (N.Y. 1984) 14
People v. Laliberté, 615 N.E.2d 813 (Ill. App. 1993) 14
Stansbury v. California, 511 U.S. 318 (1994)..... 4
Townsend v. Sain, 372 U.S. 293 (1962), *overruled by Keeny v. Tamayo-Reyes*, 504 U.S. 1 (1992)..... 12
United States v. Balsys, 524 U.S. 666 (1998).....12, 14
United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 14
Wan v. United States, 266 U.S. 1 (1924) 13
Withrow v. Williams, 507 U.S. 680 (1993)..... 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. Section 3501 ..... *passim*

OTHER AUTHORITIES

U.S. Department of Justice, Office of Legal Policy, "Report to the Attorney General on the Law of Pretrial Interrogation" (1986), reprinted in 22 U. Mich. J.L. Ref. 479 (1989) 21

INTEREST OF *AMICUS CURIAE*

The law firm of Manning & Marder, Kass, Ellrod, Ramirez specializes in the representation of law enforcement agencies and individual law enforcement officers. Many of our cases involve questions of the extent to which conduct by law enforcement officers does, or does not, infringe core constitutional protections. It is vital that the individual officers, their employing agencies, trainers and advisors represented by this firm have a clear and unmistakable resolution of the question that is now presented for decision in this Court.[1]

SUMMARY OF ARGUMENT

1. The supposed "bright line" rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), often reflexively proffered as a justification for a judicially-created exclusionary rule that routinely conceals voluntary and reliable confessions from juries seeking the truth, never has, in fact, existed. Thirty-four years of experience with *Miranda* has revealed its contours to be unworkably amorphous and unpredictable, and incapable of sustaining the false advertising of its alleged "clarity" and "ease of application."

2. Contrary to its great expectations, the *Miranda* decision has not simplified admissibility determinations

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

by obviating the need for case-specific voluntariness determinations under the Due Process Clauses. Instead, *Miranda* has complicated and burdened the process by adding an additional layer of issues to be litigated (custody, interrogation, warning, waiver, invocation, reinitiation, etc.), after which traditional voluntariness issues still must be addressed. The case-specific analysis provided by 18 U.S.C. Section 3501 is a far more sensible and efficient approach to determining confession admissibility.

3. One after another, cases and assertions upon which *Miranda* relied for its *ratio decidendi* have been rejected by subsequent decisions of this Court. Like an old sacrificial shrine sunk into the mud after the collapse of its foundation, *Miranda* retains its authority only from inertia, revered despite its obvious ineffectiveness. Inertia cannot justify the constitutional enshrinement of a decision that has failed to meet its stated goals – particularly when an Act of Congress provides a superior means of preventing testimonial use of coerced confessions, while permitting voluntary statements to be disclosed to the jury.

4. Public confidence in the Court and in the rule of law does not require overruling Section 3501. On the contrary, public confidence in the rule of law is enhanced by upholding a statute enacted by the popularly elected branch of the government, the United States Congress. The express will of the branch of government accountable to the public at the ballot box is entitled to respect and should be upheld.

ARGUMENT

1. The Fictional "Bright Line" of *Miranda* Is No Bright Line at All.

In *Miranda*, 384 U.S. at 442, the Court optimistically claimed to be giving "concrete constitutional guidelines for law enforcement agencies and courts to follow." In fact, however, the rules and exceptions to the *Miranda* theory are no better understood by police or judges today than they were in 1966.

Miranda has become this Court's most litigated case. In more than three dozen decisions construing *Miranda* over the past thirty-four years, this Court has reversed lower courts 86% of the time, overruling the misinterpretations of nine federal appellate courts, as well as the highest courts of sixteen states. This extraordinary litigation record is the most compelling proof that *Miranda's* attempt to fashion a workable "bright line" has been a dismal and costly failure.

Though the procedure recommended in *Miranda* is deceptively simple if summarized as "the administration of warnings prior to custodial interrogation," the multitude of determinations police officers and judges must make in practical application has exposed the complex, changing and uncertain nature of *Miranda*.

What, for example, is "custody"? The Court has addressed this question nine times since *Miranda*, reversing lower courts' interpretations seven times. As recently as 1994 – twenty-eight years after the "concrete guidelines" were first announced – the Court unanimously reversed the California Supreme Court (one of the

nation's most respected), which still did not understand the definition. *Stansbury v. California*, 511 U.S. 318 (1994). After nearly three decades of dealing with *Miranda*, the highest court of the largest state had not yet discerned the "bright line" concept of "custody" – but law enforcement officers and trial judges are expected to have no difficulty in identifying the point at which this *Miranda* threshold occurs?

The Court has conceded that "the task of defining 'custody' is a slippery one," and has recognized that "[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins. . . . " *Oregon v. Elstad*, 470 U.S. 298, 309, 316 (1985). This acknowledgment belies the facile claim of *Miranda's* "ease of application." "Slippery," "murky," and "difficult" are hardly the attributes of a "bright line."

And what exactly constitutes *Miranda's* second trigger – "interrogation"? The Court has wrestled with this term four times, each time reversing the lower court. And in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), a badly-fractured court produced six different opinions as to which portions of an officer's drunk-driving investigation did or did not involve "interrogation." Ultimately, the Court was unable to agree on any opinion as to the admissibility of certain booking responses. When, after twenty-four years of consideration, the members of this Court cannot agree on the definition of interrogation, what "bright line" exists to guide the actions of law enforcement officers in the field, or to guide lower court judges reviewing their actions?

On questions relating to warning, waiver and invocation, the Court has issued eleven opinions, including ten reversals. The still-confusing rules on permissible reinitiation of questioning have been the subject of six opinions (five reversals), but continue to confound police: After a suspect's *Miranda* invocation of *silence*, reinitiation of questioning is permissible as to a *different* offense, *Michigan v. Mosely*, 423 U.S. 96 (1975); but after invocation of *counsel*, police may not reapproach on the same case, *Edwards v. Arizona*, 451 U.S. 477 (1981), nor on a different case, *Arizona v. Roberson*, 486 U.S. 675 (1988) – even if the lawyer requested on the *first* case has been provided. *Minnick v. Mississippi*, 498 U.S. 146 (1990) (leaving unanswered the question of whether such invocation bars reinitiation indefinitely, as where a person remains continuously in custody after invocation of counsel and commits a crime in prison years – or decades – later). The *suspect* may reinitiate, *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) – provided officers correctly perceive the suspect's question or statement as inviting renewed interrogation.

In practice, these complex rules on reinitiation require any officer other than the arresting officer to take an "interrogation history" from the suspect to determine whether interrogation may even be attempted, and if so, on what topics. Detectives and other follow-up officers must know the following: (1) Has the suspect been Mirandized? (2) If so, did he waive? (3) If not, did he invoke only *silence*, or (4) Did he ask for *counsel*? (5) After either invocation, has the suspect reinitiated and waived the right previously asserted? Of course, an entirely different set of rules apply to assertion and waiver of the *Sixth* Amendment right to counsel, which, unlike *Miranda*, is

offense-specific, and independent of custody. Officers, therefore, must be familiar with the line of cases applying *Massiah v. United States*, 377 U.S. 201 (1964), and especially those decisions distinguishing the separate *Miranda* rules, such as *Moran v. Burbine*, 475 U.S. 412 (1986), *Michigan v. Jackson*, 475 U.S. 625 (1986), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Clarity? Ease of application? Bright line? Or unworkable convolution?

On the subject of the exclusionary consequences of an officer's failure to correctly anticipate or discern and follow *Miranda's* serpentine guidelines, this Court has issued seven opinions (six reversals). Although holding that voluntary statements lacking *Miranda* conformity are admissible for impeachment, *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Hass*, 420 U.S. 714 (1975), and ruling that a witness revealed in an inadmissible statement may testify, *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court has yet to resolve the constant issue of whether physical evidence disclosed in a noncomplying statement is admissible.

So, is there truly a "bright line" that helps to justify a decision which even the courts at all levels cannot consistently interpret? Do police officers really have "concrete guidelines" that they can reliably apply to the many interrogation issues they confront each day in the field and in the station house? The Court itself has supplied the obvious answer to these questions: "In many cases, a breach of *Miranda* procedures may not be identified as such until long after full Miranda warnings are administered and a valid confession obtained." *Oregon v. Elstad*, 470 U.S. at 316.

Since *Miranda's* line is so blurry that transgressions may not be identifiable until long after the interrogation has occurred, it follows indisputably that *Miranda* has not proven workable. The case-specific voluntariness test of Section 3501, by contrast, does not raise the plethora of "slippery" and "murky" issues associated with *Miranda*. The statute's line is far brighter, easier to apply and more likely to accomplish the twin goals of excluding statements that are actually (not just presumptively) compelled, while admitting statements found on consideration of the statutory factors to have been made voluntarily.

2. *Miranda* Is Not a Substitute for the Voluntariness Inquiry, but an Additional Inquiry, Requiring Additional Litigation.

In *Miranda*, 384 U.S. at 457, the Court admitted that in the cases before it, "we might not find the defendants' statements to have been involuntary in traditional terms." In other words, the new *Miranda* test would be a separate, independent test, that might cause suppression of statements that were in no way involuntary. The Court repeatedly has acknowledged as much: "[P]atently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case. . . . " *Oregon v. Elstad*, 470 U.S. at 307; "Although recognizing that the *Miranda* rules would result in the exclusion of some voluntary and reliable statements," the Court imposed the additional test anyway. *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

As with the invisible "bright line" discussed above, there has been an attempt to justify *Miranda* on the false assertion that *Miranda* generally guarantees voluntariness, and therefore eliminates the need to make the traditional voluntariness inquiry. One of the purposes of *Miranda* was "as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984).

This purpose has never been, and can never be, accomplished, for "the failure to provide Miranda warnings in and of itself does not render a confession involuntary." *New York v. Quarles*, 467 U.S. 649, 655, fn. 5 (1984). On the other hand, compliance with *Miranda* does not guarantee voluntariness, because in situations where a warning and waiver occur, police officers may still employ coercive tactics (such as mistreatment, threats, or promises) that render the Mirandized statement involuntary.

The Court has recognized that in addition to *Miranda* litigation, trial courts also must litigate voluntariness challenges (which, in practice, defendants routinely couple with *Miranda* challenges): "[I]n situations that fall outside the sweep of the *Miranda* presumption, 'the primary criterion of admissibility [remains] the "old" due process voluntariness test.' " *Oregon v. Elstad*, 470 U.S. at 307-08; even after *Miranda*, "the Court has continued to measure confessions against the requirements of due process." *Miller v. Fenton*, 474 U.S. 104, 110 (1985); "Indeed, we continue to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process."

Withrow v. Williams, 507 U.S. 680, 689 (1993); *accord, Colorado v. Connelly*, 479 U.S. 157, 163 (1986), in which this Court engaged in the two-part analysis now necessitated to resolve both the *Miranda* issues and the due process voluntariness issues.

Miranda has in fact not eliminated the need for traditional due process review. It has merely added to the burden on law enforcement, counsel and courts to determine admissibility of statements. The fiction that *Miranda* reduces litigation and saves judicial resources cannot legitimately be used to justify an unwarranted exclusionary rule that frequently results in the suppression of "the most probative and damaging evidence that can be admitted against [the defendant]." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (citations omitted).

Section 3501 more sensibly eliminates the double litigation burden of two hearings. More importantly, the statute provides a consolidated examination of both the components of *Miranda* and the traditional voluntariness factors of due process. This more efficient procedure assures that coerced confessions will not be used, while permitting use of truly voluntary statements. The statute accomplishes what *Miranda* cannot, and does so without *Miranda's* costly and unjustifiable suppression of highly probative, reliable and voluntary evidence of the truth.

Section 3501 protects a suspect's assertion of his right to silence or counsel, while permitting a trial judge to consider all of the enumerated factors in determining admissibility of statements, including the time between arrest and arraignment, the suspect's understanding of the nature of the offense, whether the suspect knew he

was not required to make any statement, whether the suspect had been advised of his right to counsel, and whether the suspect had the assistance of counsel at the time the statement was made. 18 U.S.C. § 3501(b). If, for example, a particular suspect was not cautioned of his rights in a timely fashion, but evidence showed many prior arrests where the suspect had been admonished and had variously waived or asserted his rights and was therefore quite familiar with them, his otherwise voluntary statement need not necessarily be lost to the fact-finder by technical default, as has often been the case under *Miranda*.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Excluding voluntary statements by a judicial presumption that has never been supported by empirical facts tends to "deflect a criminal trial from its basic purpose." *Colorado v. Connelly*, 479 U.S. at 166. *Miranda's* high costs in the search for the truth cannot be justified by the claim that it reduces litigation and simplifies admissibility determinations – it does neither. In contrast, Section 3501 does in fact reduce litigation and allow the uncoerced truth to be presented to the jury. No rational objective, therefore, is served by inertial preference for *Miranda's* anachronistic scheme over a legislative alternative that more efficiently protects constitutional rights and facilitates – rather than thwarts – the search for the truth. "We are, after all, always engaged in a search for truth in a criminal case. . . . " *Oregon v. Hass*, 420 U.S. at 722.

3. Assuming *Miranda's* Premises and Conclusions Once Were Supported by Precedent or by Logic, Subsequent Developments Have Revealed *Miranda's* Fallacies.

Invocations of constitutional imperative notwithstanding, *Miranda* was essentially the assumption of five members of the Court – unsupported by any empirical evidence – that custodial interrogation was by its nature coerced interrogation. So much so that the privilege against compelling a defendant to testify at trial necessarily was implicated by questioning a suspect in custody. The warning and waiver procedure then approved was assumed to dissipate the coercion, serving as a prerequisite to admission of statements.

With all due respect for the good intentions of the *Miranda* opinion, the kindest thing to be said of the rationale and purported justifications for that revolutionary departure from nearly two hundred years of Fifth Amendment jurisprudence is that the rambling, sixty-page opinion did not provide cogent support for its holding. During the thirty-four years of *Miranda's* existence, virtually every brick of *Miranda's* foundation has crumbled or been removed. A few examples will suffice to illustrate that *Miranda* has not withstood the test of time or met the demands of practicality.

Miranda's analytical starting point was the earlier holding in *Escobedo v. Illinois*, 378 U.S. 478 (1964) – a *Sixth* Amendment case. *Miranda v. Arizona*, 384 U.S. at 440-442. After a "thorough re-examination" of the two-year-old *Escobedo* decision, the Court declared, "we reaffirm it." *Ibid.* While building on a "reaffirmed" *Escobedo* may have

been convenient and necessary to help shore up *Miranda's* ruling, the Court, strangely enough, limited *Escobedo* to its own facts just one week later in *Johnson v. New Jersey*, 384 U.S. 719, 733-34 (1966). The Court has since declined to honor *Escobedo* as precedent for any proposition: "[T]he Court has limited *Escobedo* to its own facts. . . . " *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). *Miranda's* discussion of *Escobedo* "is not only dictum, but reflects an understanding of the case that the Court has expressly disavowed." *Moran v. Burbine*, 475 U.S. at 430. So much for *Miranda's* reliance on *Escobedo*.

While purporting to find textual and historical authority for its Fifth Amendment holding, *Miranda* instead leaned almost exclusively on *Fourteenth* Amendment due process cases coming from the states, *e.g.*, *Blackburn v. Alabama*, 361 U.S. 199 (1960), *Townsend v. Sain*, 372 U.S. 293 (1962), *overruled by Keeny v. Tamayo-Reyes*, 504 U.S. 1 (1992), *Lynumn v. Illinois*, 372 U.S. 528 (1963), *Haynes v. Washington*, 373 U.S. 503 (1963), *Chambers v. Florida*, 309 U.S. 227 (1940), and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). The Fourteenth Amendment, protecting against actual coercion, provides no support for a Fifth Amendment ruling on presumptive compulsion.

One of the few Fifth Amendment cases cited in *Miranda*, *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), dealt not with custodial interrogations, but with immunized testimony. *Murphy*, moreover, was seriously undercut in *United States v. Balsys*, 524 U.S. 666 (1998). Another Fifth Amendment decision repeatedly cited by *Miranda* was *Bram v. United States*, 168 U.S. 532 (1897). But *Bram's* broad central theme, "which under current precedent

does not state the standard" for confession analysis, *Arizona v. Fulminante*, 499 U.S. at 285, can no longer buttress *Miranda's* extrapolations from it.

Quoting from *Wan v. United States*, 266 U.S. 1 (1924), which in turn had relied on *Bram*, *Miranda* repeated that a compelled confession must be excluded, "whatever may have been the character of the compulsion." *Miranda v. Arizona*, 384 U.S. at 462. But this sweeping rule was pointedly rejected by this Court in *Colorado v. Connelly*, 479 U.S. at 164-67, where the character of the compulsion was a "command hallucination from God" to confess. *Connelly* held that the character of the compulsion was not nearly as broad as "whatever," but must derive from coercive *police* activity. And in *Oregon v. Elstad*, 470 U.S. at 304-05, the Court noted that "The Fifth Amendment, of course, is not concerned with . . . moral and psychological pressures to confess emanating from sources other than official coercion." To the extent that *Bram* may ever have been said to undergird *Miranda*, that claim can no longer be made.

Miranda's footnote 33, 384 U.S. at 464, cites a number of cases for the rule, then extant, that introduction of a coerced confession requires reversal of a conviction, even if there is ample evidence to sustain the judgment. That rule was overturned in *Arizona v. Fulminante*, 499 U.S. 279 (1991).

The *Miranda* Court thought the Fifth Amendment was designed, in part, "to respect the inviolability of the human personality. . . . " *Miranda v. Arizona*, 384 U.S. at 460. But this Court recently stated "[t]he Fifth Amendment tradition, however, offers no such degree of protection," and that "what we find in practice is not the

protection of personal testimonial inviolability. . . . " *United States v. Balsys*, 524 U.S. at 692.

In *Miranda*, the Court ruled that "the Fifth Amendment privilege is available" to be claimed during custodial interrogations. *Miranda v. Arizona*, 384 U.S. at 461, 467. Though this ruling implies that the Fifth Amendment also can be *violated* at interrogations lacking *Miranda* compliance (and numerous lower courts have indeed drawn this conclusion), this Court has since clarified that while police questioning may implicate the Fifth Amendment privilege, "a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

Miranda referred to the prescribed warnings as "an absolute prerequisite" to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 468, 471. But in *New York v. Quarles*, 467 U.S. at 654, this Court decided that the "prophylactic" *Miranda* procedures, not themselves being required by the Constitution, were not so absolute after all. The Court made an exception for public safety questioning, and lower courts have relied on *Quarles* to approve exceptions for officer safety questioning, rescue of kidnap victims, and assessing a wounded arrestee's injuries and need for treatment. *E.g.*, *People v. Laliberte*, 615 N.E.2d 813, 816-32 (Ill. App. 1993) (after kidnaper's assertion of rights, FBI agents questioned to rescue one-year-old left in a duffle bag in the woods); *cf.*, *People v. Krom*, 461 N.E.2d 276, 278-79 (N.Y. 1984) (when kidnaper asked for counsel, questioning was delayed, and the victim was later found suffocated in a coffin-like box).

This Court also found *Miranda's* "absolute prerequisite" inapplicable to custodial interrogation conducted by an undercover officer, in *Illinois v. Perkins*, 496 U.S. 292 (1990). *Miranda's* categorical command, a key to its holding, thus has not survived intact.

Also failing preservation were *Miranda's* insistence that any post-warning waiver be "specifically made," and its caution that while an "express statement" might constitute a waiver, no waiver could be presumed from the fact that a confession was eventually obtained. *Miranda v. Arizona*, 384 U.S. at 470, 475. But in *North Carolina v. Butler*, 441 U.S. 369 (1979), this Court held that a waiver need not be express, but could be inferred from the fact that a suspect answered questions after being apprised of his rights.

Miranda declared that upon invocation of the right to silence, interrogation must cease, and that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion. . . . " *Miranda v. Arizona*, 384 U.S. at 473-74. The seemingly unqualified import of these declarations was repudiated in *Michigan v. Mosley*, 423 U.S. at 102, where the Court found that literal application would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity. . . . "

The rationale put forward in *Miranda* was premised, in part, on the mistaken notion that custodial interrogation triggered the protections of the Fifth Amendment, because "It is at this point that our adversary system of criminal proceedings commences. . . . " *Miranda v. Arizona*, 384 U.S. at 477. But this statement is at odds with

language from a long line of *Sixth* Amendment cases, holding that adversary criminal proceedings do not commence until formal charging, indictment, information, preliminary hearing or arraignment. Reaching one of these stages – well beyond custodial interrogation – "is the starting point of our whole system of adversary criminal justice." *Kirby v. Illinois*, 406 U.S. at 689.

Although *Miranda* seemed to allow interrogation without warnings only "of persons not under restraint," *Miranda v. Arizona*, 384 U.S. at 477, the Court has subsequently ruled that no warnings need be given to those under the restraint of a temporary detention, not equivalent to formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

Another of *Miranda's* rigid exclusionary commands was that without warnings and waiver by the arrestee, "no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. at 479. The Court subsequently decided, however, that some evidence obtained by noncomplying interrogation could be used. *Michigan v. Tucker*, 417 U.S. at 450 (testimony of witness discovered through unwarned questioning admissible); *Harris v. New York*, 401 U.S. at 224 (unwarned impeachment statements admissible, because *Miranda's* language barring any use of such evidence "cannot be regarded as controlling").

The *Miranda* Court assumed that its holding would not hamper police investigations of crimes: "[O]ur decision does not in any way preclude police from carrying

out their traditional investigatory functions." *Miranda v. Arizona*, 384 U.S. at 481. This false assertion has been contradicted repeatedly: *New York v. Quarles*, 467 U.S. at 657 (*Miranda* created "procedural safeguards which deter a suspect from responding. . . . "); *Oregon v. Elstad*, 470 U.S. at 309 ("*Miranda* warnings may inhibit persons from giving information. . . . ").

At one point, *Miranda* stated that the existence of independent corroborating evidence was "irrelevant" to the issue of admissibility of unwarned statements. *Miranda v. Arizona*, 384 U.S. at 481, fn. 52. Shortly thereafter, the opinion tries to prop up its decision by comparison with the practices in such countries as Great Britain, Scotland, India and Ceylon – selected nations with a requirement of pre-interrogation advice. *Id.*, at 486-489. But as Justice O'Connor noted in her separate opinion in *Quarles*, "the trend in these other countries is to admit the improperly obtained statements themselves, if nontestimonial evidence later corroborates, in whole or in part, the admission." *New York v. Quarles*, 467 U.S. at 673, fn. 6 (O'Connor, J., concurring and dissenting). In this regard, *Miranda* was internally inconsistent, using those foreign practices that supported its holding, and ignoring those that did not.

These examples show that *Miranda* made numerous analytical errors, relied on cases that did not support its holding, relied on cases that have since been disapproved, and made broad statements this Court has subsequently been unable to embrace in practice. Even if the assumptions and rulings of *Miranda* had some validity in 1966, in 2000 it is not possible to escape the impact of thirty-four years of its demonstrated impracticality, or to

ignore the fact that subsequent developments in the law in more than three dozen cases decided by this Court have revealed the numerous faults of a poorly reasoned opinion.

Miranda's foundation is gone. Continuing to require society to pay the high price of excluding from trials probative, voluntary statements of accused criminals on the basis of a court-created presumption that is not itself constitutionally authorized or required, that has not proven workable, and that complicates admissibility determinations, is to place *stare decisis* in the realm of idolatry.

4. Upholding Section 3501 Will Not Undermine Confidence in the Judicial System.

Even if the quasi-constitutional rationale of the *Miranda* opinion were not already dead and gone, there would be considerable grounds for abandoning it and upholding Section 3501. It is well known that "*stare decisis* is not an inexorable command," and "this is particularly true in constitutional cases." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Consideration in favor of *stare decisis* is at its nadir in cases like this one, "involving procedural and evidentiary rules." *Ibid.* Like the decisions overruled in *Payne*, *Miranda* was decided "by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings." *Id.*, at 828-29.

It has been submitted, however (Government's *certiorari* brief at 36-37, and merits brief at 43-44 and 56-57), that *Miranda* should be maintained because the public's familiarity with the basic notion of "reading a suspect his

rights" would cause a loss of confidence in the justice system and this Court if *Miranda* is modified or overturned. Not true.

It is dubious, to put it mildly, that the public at large has ever accepted the idea that the criminal should go free because the constable has blundered. There is no reason to believe that most members of the public would favor suppressing a suspected bank robber's voluntary statements based on a disputed finding that he was not given *Miranda* warnings at a particular time. More generally, there is no reason to believe that the public would favor *Miranda's* rigid exclusionary rule over the more flexible approach of Section 3501.

There is nothing to support the Government's vague suggestions that "citizen cooperation" and "support" for law enforcement would somehow diminish if Section 3501 were upheld. This certainly is not the view of law enforcement, as shown by the overwhelming support of law enforcement and prosecution agencies for upholding the statute. In general, nothing will be lost to law enforcement by upholding Section 3501, because nothing in the statute prevents or discourages law enforcement agencies from continuing the *Miranda* procedures (or other similar procedures) to the extent they are found to be beneficial. If law enforcement agencies wish to follow this procedure hereafter – in order to maintain public confidence or to contribute to a finding of voluntariness of statements – they remain perfectly free to do so. As the Court noted on another *Miranda* issue, "the police do not need our assistance to establish such a guideline; they are free, if they wish, to adopt it on their own." *McNeil v. Wisconsin*, 501 U.S. at 181-82..

Moreover, to the extent that the Government's argument rests on the supposed popularity of the *Miranda* rules, it takes the extremely odd position that the Court should be the arbiter and enforcer of the public will – in contravention of a statute duly enacted by the Congress, which is directly accountable to the public at the ballot box. This simply is not the way the separation of powers works in a representative democracy. Nothing is lost to self-government by upholding the statute. To the extent the public may actually favor the continuation of *Miranda*-like procedures, or the adoption of any alternative interrogation procedures that are consistent with constitutional protections, the lawmakers and administrators who depend on the public's approval for their continued tenure in office will take account of those preferences. Indeed, it is the invalidation of Section 3501 that would do serious harm to democracy by foreclosing the possibility of doing *anything* other than clinging to *Miranda*, regardless of what the public may wish.

There is also nothing to the claim that striking down Section 3501 is necessary in order to maintain public confidence in the Court. At a practical level, the Court's rulings have been obeyed throughout history, come what may. A decision one way or the other in this case will have no effect on that.

If, on the other hand, the relevant concern is some spiritual or symbolic desirability of maintaining public confidence in the Court, this consideration also favors upholding the statute. Members of the public who know something about the issue presumably would find it odd if the Court held unconstitutional a statute which requires nothing that the Constitution prohibits, and

would therefore feel less confidence that the Court observes the constitutional limits on its own powers.

The *Miranda* decision was not based on a sound interpretation of the Constitution. *See* U.S. Department of Justice, Office of Legal Policy, "Report to the Attorney General on the Law of Pretrial Interrogation" (1986), reprinted in 22 U. Mich. J.L. Ref. 479, 491-506 (1989). Obstinacy in maintaining the product of constitutional error could only serve to discredit the Court. Fidelity to the Constitution is the surest long-term guarantor of public confidence in the Court, and fidelity to the Constitution requires that Section 3501 be upheld. Section 3501 provides a legal, efficient and workable alternative to *Miranda*. This Act of Congress should be sustained.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

David J. Wilson
Counsel of Record
Counsel for Amicus Curiae

Mar 9 2000

(24)

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF *AMICI CURIAE* CITIZENS FOR LAW AND ORDER AND THE DORIS TATE CRIME VICTIMS BUREAU URGING AFFIRMANCE

THEODORE M. COOPERSTEIN*

THEODORE M. COOPERSTEIN, P.C.
1815 Pennsylvania Avenue, N.W.
Suite 501
Washington, D.C. 20006
(202) 331-7895

**Counsel of Record*

BEST AVAILABLE COPY

32 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. AN ADEQUATE LEGAL REMEDY EXISTS FOR CONSTITUTIONAL VIOLATIONS BY THE SOVEREIGN'S OFFICERS.	5
A. Wrongs of the Sovereign Are Attributable to Its Servants, Not to the Sovereign Itself.	5
B. The Law Affords A Cause of Action For Damages as an Established Remedy for Constitutional Torts.	9
II. NO NEED OR BASIS REMAINS FOR THE EQUITABLE REMEDY OF SUPPRESSION OF EVIDENCE.	15
A. The Existence of an Adequate Remedy at Law Obviates the Need for Equitable Measures to Redress Constitutional Wrongdoing.	16
B. The Court, No Less Than Congress, May Not Fashion a Rule to Redefine a Constitutional Right.	22
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 8, 23
Anderson v. Creighton, 483 U.S. 635 (1987) 18
Bell v. Hood, 327 U.S. 678 (1946) 9,10,17
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) passim
Bradt v. Smith, 634 F.2d 796 (5th Cir.), *cert. denied*, 454 U.S. 830 (1981) 14
Bush v. Lucas, 462 U.S. 367 (1983) 19
Butz v. Economou, 438 U.S. 478 (1978) 19
Carlson v. Green, 446 U.S. 14 (1980) 12,13,15,20
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 7
City of Boerne v. Flores, 521 U.S. 507 (1997) 25,26
Davis v. Passman, 442 U.S. 228 (1979) 12,13,19
Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 7
FDIC v. Meyer, 510 U.S. 471 (1994) 7
Heck v. Humphrey, 512 U.S. 477 (1994) 18
Irvine v. California, 347 U.S. 128 (1954) 22
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) passim

TABLE OF AUTHORITIES -- Continued

Page

Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit, 507 U.S. 163 (1993) 18
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 9,10
Miranda v. Arizona, 384 U.S. 436 (1966) passim
Mitchell v. Forsyth, 472 U.S. 511 (1985) 18
Monell v. Department of Social Servs., 436 U.S. 658 (1978) 18
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 17
Nevada v. Hall, 440 U.S. 410 (1979) 7
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 18
O'Shea v. Littleton, 414 U.S. 488 (1974) 17
Owen v. City of Independence, 445 U.S. 622 (1980) 18
Pulliam v. Allen, 466 U.S. 522 (1984) 18
Riley v. Dorton, 115 F.3d 1159 (4th Cir.), *cert. denied*, 522 U.S. 1030 (1997) 14
Schweiker v. Chilicky, 487 U.S. 412 (1988) 19
Siegert v. Gilley, 500 U.S. 226 (1991) 18
Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930) 9
United States v. Nafkha, 139 F.3d 913 (10th Cir. 1998) 1
United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah 1997) 1
Wilkins v. May, 872 F.2d 190 (7th Cir. 1989),

TABLE OF AUTHORITIES -- Continued

	Page
cert. denied sub nom. Wilkins v. McDaniel, 493 U.S. 1026 (1990)	14
Ex Parte Young, 209 U.S. 123 (1908)	8
Younger v. Harris, 401 U.S. 37 (1971)	17

CONSTITUTION AND STATUTES

U.S. Const. art. V	25
U.S. Const. art.VI, cl. 2	7
U.S. Const. amend. V	passim
U.S Const. amend. XI	8
18 U.S.C. § 3501	1,2,13
28 U.S.C. § 2680(h)	18
42 U.S.C. § 1983 *et seq.*	18

OTHER

William Blackstone, Commentaries on the Laws of England (1768)	5, 7
Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897)	16
Brief for the United States, *INS v. Lopez-Mendoza*, No. 83-491 (U.S. 1984)	20

INTEREST OF *AMICI CURIAE*[1]

Citizens for Law and Order ("CLO") is a nonprofit corporation founded in 1970 to monitor and improve the criminal justice system in the State of California. Among CLO's objectives are monitoring races for judicial office in California to ensure the proper administration of justice and monitoring federal legislation to see that criminal statutes are construed and applied in accordance with the United States Constitution. CLO has participated as an *amicus curiae* in previous litigation concerning the federal statute codified at 18 U.S.C.§ 3501, including the submission of briefs to the United States Court of Appeals for the Tenth Circuit, in *United States v. Nafkha*, 139 F.3d 913 (10th Cir. 1998), and to the United States District Court for the District of Utah, in *United States v. Rivas-Lopez*, 988 F. Supp. 1424 (D. Utah 1997).

The Doris Tate Crime Victims Bureau ("the Bureau") is a California nonprofit organization established in 1992 and dedicated to improving public safety and helping the victims of crime and their families. The Bureau advocates passage of

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, its members, or counsel contributed money or services to the preparation or submission of this brief.

public safety legislation and legislation affecting crime victims and their rights. It monitors elected officials' votes on issues of public safety and victims' rights legislation, and it works to bring together and coordinate the efforts of crime victims organizations throughout California in order to increase their effectiveness. The Bureau is named after the late victims' rights crusader, Doris Tate, whose daughter Sharon was brutally murdered in 1969 by members of the Charles Manson cult.

The issue before this Court is the constitutionality of the federal statute codified at 18 U.S.C. § 3501, which in this case would permit the admission into evidence of petitioner Charles Dickerson's voluntary confession to multiple bank robberies, despite a technical violation of the Court's rule set out in *Miranda v. Arizona*, 384 U.S. 436 (1966), requiring the formal advice of four rights to any suspect prior to custodial interrogation. The possibility that suppression of truthful evidence in criminal trials might result from the Court's ruling on Section 3501 threatens to impede the interests of society at large, and the victims of crime in particular, in seeing justice done for criminal acts. CLO and the Bureau accordingly have a significant interest in the outcome of this case.

CLO and the Bureau urge the Court to affirm the ruling of the Fourth Circuit and uphold the constitutionality of 18 U.S.C. § 3501.

SUMMARY OF ARGUMENT

1. Where a constitutional violation occurs in the course of a criminal prosecution, there exists an adequate and effective remedy at law. Established law of this Court provides that a direct civil action for damages may be brought against individual constitutional tortfeasors. This legal remedy is in fact the preferable method of redressing intentional violations of the Constitution, by making those responsible pay a penalty for their actions. The remedy also serves to deter further misconduct by those same officials or future wrongdoers, who must personally take into account the cost of their actions. Accordingly, it is neither necessary nor advisable that courts suppress evidence as a sanction for constitutional violations to the rights of an accused.

2. In contrast, the present legacy of *Miranda* and its exclusionary rule lays a sanction on society and the sovereign people through the impairment of the system of justice. Likely as not, the offending officer suffers no more than wounded pride and one more entry in his win-loss record. Because the people are sovereign in our constitutional structure, sovereign immunity operates to shield the people from the sanctions properly attributable to the knowing or reckless conduct of the individual officer. The regime of private civil actions for

constitutional violations established and developed since the Court's ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* remedies harm to the rights of the accused while it leaves to the public and individual victims their interest in seeing justice served. To preserve or continue the exclusionary rule under *Miranda*, in the face of this subsequent development, violates sovereign immunity. It also can lead the Court to exceed its own authority by improperly altering the extent and the nature of a constitutional right, outside the appropriate method of constitutional amendment.

ARGUMENT

It is helpful to begin from first principles and examine anew the problem of violations of the Constitution by law enforcement officers who coerce or mistreat the accused. After determining what remedies are in fact presently available to redress the violation of constitutional rights during criminal investigations, the Court might then evaluate the effectiveness and consistency of the *Miranda* ruling, and in particular its exclusionary rule, with those principles in today's context.

I. AN ADEQUATE LEGAL REMEDY EXISTS FOR CONSTITUTIONAL VIOLATIONS BY THE SOVEREIGN'S OFFICERS.

Criminal law enforcement in our history has always been a public matter consigned to the power and duties of the sovereign, rather than to the private individual. Law enforcement accordingly must be measured against the powers and authority specifically granted to the sovereign, and the limits upon the exercise of that power. When the officers of the law are found to have exceeded those limits, the resulting harms to individual rights merit relief, but that relief must take note of the fact that "the remedy in such cases is generally of a peculiar and eccentrical nature." 3 William Blackstone, Commentaries on the Laws of England *116 (1768).

A. Wrongs of the Sovereign Are Attributable to Its Servants, Not to the Sovereign Itself.

At the time of the Constitutional Convention, the principle of sovereign immunity was well established in English common law. As has often been stated since, the rule succinctly relies upon the concept that "the King can do no wrong." As more

fully known to the Framers, that principle had a reasoned basis that did not, and does not, preclude relief to the individual citizen harmed by a wrongful government act:

> That the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, (for who shall command the king?), yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* an injury and

> to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

3 Blackstone, *supra*, *254-55 (emphasis original). *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949) ("If "the king can do no wrong, then it may be also assumed that if the king's agent does wrong that action cannot be the action of the king."). There was in fact a civil action available at English common law for wrongful criminal process. 4 Blackstone, *supra*, at *136 ("A conspiracy also to indict an innocent man of felony falsely and maliciously, who accordingly is indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may ... have a civil action by writ of conspiracy").

Upon declaring independence, the people of the respective States succeeded to sovereignty at common law. *Nevada v. Hall*, 440 U.S. 410, 418 (1979); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434-35 (1793) (Iredell, J., dissenting). Upon ratification of the Constitution, the United States became sovereign within its respective spheres under the Constitution. U.S. Const. art. VI, cl. 2; *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, ___, 119 S. Ct. 687, 690 (1999); *FDIC v.*

Meyer, 510 U.S. 471, 475 (1994). The United States and the respective States therefore enjoy general sovereign immunity within the state and federal courts. U.S Const. amend. XI; *see Alden v. Maine*, 527 U.S. 706, ___, 119 S. Ct. 2240, 2248 (1999).

Yet this sovereign immunity does not mean there is no relief for the individual who suffers the violation of a right under the Constitution. The government officer who violates the Constitution acts outside of his authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S at 689 (1949) ("where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions."); *id.* at 697 (challenged act was "unconstitutional use of their power and was, therefore not validly authorized by the sovereign."). A court may prohibit or enjoin future or continued unconstitutional conduct by an individual government officer. *Ex Parte Young*, 209 U.S. 123 (1908). More tellingly for the present case, the law also permits of an individual remedy in damages for past harms in violation of Constitutionally protected rights.

> [T]he fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. ....

> .... In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty.

Larson, 337 U.S. at 687. It is therefore most appropriate to visit the wrongful violation of the Constitution upon the officer or officers who performed the wrong against the sovereign's authority or will.

B. The Law Affords A Cause of Action For Damages as an Established Remedy for Constitutional Torts.

1. Over fifty years ago, this Court stated an already established principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162, 163 (1803); *Texas & N.O. R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569, 570 (1930)). By alleging in his complaint that Agents of the Federal Bureau of Investigation

violated his Fourth and Fifth Amendment rights, plaintiff Arthur Bell properly stated a cause of action arising under the Constitution and laws of the United States. Without reaching the question of appropriate relief, the Court found there was federal jurisdiction to consider the claim. 327 U.S. at 682. The Court remanded the case for trial, and left open the determination of an appropriate remedy, which Bell contended would include damages against the individual Agents.

2. That damages are available in a direct civil action for violations of Constitutional rights became the settled law in the Court's opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court in *Bivens* continued where it left off in *Bell v. Hood*, and held that "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Id.* at 389.

Because "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," *Marbury v. Madison*, 5 U.S. at 163, the Court in *Bivens* held,

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

Bivens, 403 U.S. at 395-96. The Court thereby gave effect to the principles of the Fourth Amendment and made those officials who must obey the Constitution personally responsible for its violation.

Mr. Justice Harlan elaborated on this reasoning, and on the Court's authority to so rule, in his concurring opinion in *Bivens,* agreeing "that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment." *Id.* at 400. Justice Harlan wrote,

> I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. ....
> [T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests

> federal courts of the power to grant damages absent express congressional authorization.

Id. at 403-404. "[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Id.* at 407; *see Davis v. Passman*, 442 U.S. 228, 241 (1979) ("the judiciary is clearly discernable as the primary means through which these rights may be enforced"). It is therefore "entirely proper that these injuries be compensable according to uniform federal rules of law," 403 U.S. at 409, and that "[d]amages as a traditional form of compensation for invasion of a legally protected interest" be an available remedy at law. *Id.* at 408.

3. The *Bivens* cause of action extends beyond the Fourth Amendment, and permits aggrieved parties to seek relief for harm from violations of other Amendments in the Bill of Rights. *E.g., Davis v. Passman*, 442 U.S 228 (1979) (Fifth Amendment Due Process); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment); *see also Davis v. Passman*, 442 U.S. at 252 (Powell, J., dissenting) ("To be sure, it has been clear – at least since *Bivens* – that in appropriate circumstances private causes of action may be inferred from provisions of the Constitution.") (citation omitted). "*Bivens* established that the victims of a constitutional

violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any congressional statute conferring such a right." *Carlson v. Green,* 446 U.S. at 18.

To state a claim under *Bivens*, a plaintiff must "assert[] a constitutionally protected right;" "state[] a cause of action which asserts this right;" and claim "relief in damages constitut[ing] an appropriate form of remedy." *Davis v. Passman*, 442 U.S. at 234. A plaintiff who properly pleads these elements must then proceed to "first demonstrate that his constitutional rights have been violated," after which he "should then be able to redress [his] injury in damages, a remedial mechanism normally available in the federal courts." *Id.* at 248 (citation omitted).

4. Criminal defendants, like Charles Dickerson, who claim their confessions were given in technical violation of *Miranda*, assert violations by federal law enforcement officers of their constitutional rights under the Fifth Amendment. The Fifth Amendment forbids compulsory self-incrimination. U.S. Const. amend. V. A confession deemed involuntary, whether by an irrebuttable presumption under *Miranda*, or by the trial court's factual determination in each case, *see* 18 U.S.C. § 3501, must necessarily be viewed as the result of a coercive or improper interrogation, and therefore as an actionable violation of the constitutional right to

due process. *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (Posner, Cir. J.) ("When the deprivation [of the constitutional right] occurs in the course of a police interrogation – a stage in the criminal justice process – it is fairly described as a denial of due process."), *cert. denied sub nom. Wilkins v. McDaniel*, 493 U.S. 1026 (1990). Other courts as well have suggested the availability of civil actions as a remedy for Fifth Amendment violations in custodial interrogation. *See Riley v. Dorton*, 115 F.3d 1159, 1164-66 (4th Cir.) (potential for claims under 42 U.S.C. § 1983), *cert. denied*, 522 U.S. 1030 (1997); *Bradt v. Smith*, 634 F.2d 796, 800 (5th Cir.) (§ 1983 claims), *cert. denied*, 454 U.S. 830 (1981).

Dickerson, and other criminal defendants like him, can accordingly seek relief in damages against the individual officers and Agents who interrogated him, under a *Bivens* cause of action for violations of his Fifth Amendment rights. It does not necessarily follow, however, that the Court must or should apply the exclusionary rule of *Miranda* to exclude Dickerson's confession from evidence at his criminal trial.

II. NO NEED OR BASIS REMAINS FOR THE EQUITABLE REMEDY OF SUPPRESSION OF EVIDENCE.

Whether or not one concurs in the merits of the initial implication by the *Bivens* Court of a private right of action for violation of the Constitution, *see, e.g., Carlson v. Green,* 446 U.S. at 31 (Rehnquist, J., dissenting), unless the Court today is willing to overrule *Bivens*, it should recognize that an established and adequate damages remedy at law is now available for the person who alleges a constitutional violation in the inducement of his confession to a crime. If petitioner Dickerson is alleging a constitutional violation (in addition to, or perhaps by reason of, a technical *Miranda* violation), he too could file suit. This is a substantially different circumstance than prevailed in 1966 when the Court issued its *Miranda* opinion, and accordingly, there no longer is the same justification for the blanket application of an exclusionary rule to otherwise truthful or probative evidence obtained from a defendant.

As Chief Justice Burger noted in his *Bivens* dissent, the implication of a damages remedy afforded the opportunity to revisit the sensibility and effectiveness of the exclusionary rule. Even more so today, almost thirty years later, "Our adherence

to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need for effective enforcement mechanisms bring to mind Holmes's well known statement:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. *It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.*

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) (quoted in *Bivens*, 403 U.S. at 419-20) (emphasis added).

The Court should therefore reconsider the exclusionary rule imposed by *Miranda*. *Cf.* 384 U.S. at 490 ("Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so.").

A. The Existence of an Adequate Remedy at Law Obviates the Need for Equitable Measures to Redress Constitutional Wrongdoing.

Since the Court's ruling in *Miranda*, State and federal courts have regularly suppressed

confessions as an equitable remedy for purported violations of the defendants' rights under the Fifth and Fourteenth Amendments. Viewed as a response to the wrongful act of a government officer, however, that remedy does not comport with the traditional requirements of the common law and equity as they have developed in American jurisprudence. Nor does it truly address the real problem with an effective answer.

A standard prerequisite for the exercise of equitable relief by a court is the absence of an adequate and effective remedy at law. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380 (1992); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) ("basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law"); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). This may well have been the case with respect to coerced confessions in 1966 when the Court heard the *Miranda* case. *See Bell v. Hood*, 327 U.S. 678, 682 (1946). But the Court's later *Bivens* opinion admittedly created a new form of action against federal officers, not previously available in 1966. 403 U.S. at 389.

In other respects the legal landscape has changed as well. The United States has enacted a limited waiver of sovereign immunity for certain intentional torts that may be committed by federal

law enforcement officers. 28 U.S.C. § 2680(h) (Federal Tort Claims Act). Civil liability of State officers, and municipalities, for violations of the Fourteenth Amendment is now a well-established body of law under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1983 *et seq.*, and related case law precedents of this Court. *See, e.g., Owen v. City of Independence,* 445 U.S. 622 (1980); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Both *Bivens* and Section 1983 actions are now subject to a sophisticated body of law regarding pleading requirements, *e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 507 U.S. 163 (1993); *Siegert v. Gilley*, 500 U.S. 226 (1991); and defenses of qualified immunity, *e.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); or even absolute immunity, *e.g., Pulliam v. Allen*, 466 U.S. 522 (1984); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In the criminal law context, civil actions for constitutional violations must await the outcome of appellate review of the criminal trial, and thereby do not risk interfering with the criminal justice system. *Heck v. Humphrey*, 512 U.S. 477 (1994).

It is difficult, then, if not impossible, to say that Dickerson and defendants like him lack meaningful and adequate legal remedy or relief. There is now in place a legal regime providing for actions at law, and that regime may in fact better

serve the ends of the Constitutional prohibitions at issue.[2]

As noted above, the problem underlying a constitutional violation in the criminal process is both conceptually and practically focused upon the individual government officer. The government can only act through its individual officers as its agents. *Larson,* 337 U.S. at 688 ("when the agents' actions are restrained, the sovereign itself may, through him, be restrained."). "All individuals, whatever their position in government, are subject to federal law." *Butz v. Economou*, 438 U.S. 478, 506 (1978) (quoted in *Davis v. Passman*, 442 U.S. at 246). But "however desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 433 U.S. at 410 (Harlan, J., concurring).

Direct civil liability of the individual officer more precisely addresses the problem and the resultant harm from the constitutional violation. It is more fitting that an official wrongdoer face

---

[2] This is not to say that Congress might not supplant that regime by future legislation. But failing that, the *Bivens* action remains the primary vehicle for redress. *Cf. Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (No *Bivens* cause of action lies where "Congress has not failed to provide meaningful safeguards or remedies"); *Bush v. Lucas*, 462 U.S. 367, 386 (1983) (*Bivens* action foreclosed by "Government's comprehensive scheme" that "provides meaningful remedies for [federal] employees").

personal liability, and therefore be forced to internalize the costs of his intentional violations of the Constitution, rather than foist them off on the public.

> [T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent.... It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability.

Carlson v. Green, 446 U.S. at 21; *see Larson*, 337 U.S. at 687 ("the principle that an agent is liable for his own torts is an ancient one and applies even to certain acts of public officers"). The United States Department of Justice has itself argued this very point in the past: "Even if *Bivens* suits are relatively rare, the mere prospect of such being brought is a powerful disincentive to unlawful conduct. It defies common sense to suppose that fear of a suit against [a federal] officer in his individual capacity, in which he is faced with the possibility of personal liability, has no influence on his conduct." Brief for the United States at 34, *INS v. Lopez-Mendoza*, No. 83-491 (U.S. 1984).

The availability and precision of civil damages relief contrasts sharply with the overkill of the exclusionary rule. "If an effective alternative remedy is available, concern for the official observance of the law does not require adherence to the exclusionary rule." *Bivens*, 403 U.S. at 414 (Burger, C.J., dissenting). An officer who violates the defendant's Fifth Amendment right is liable in a civil *Bivens* action for damages. But if a government officer in the course of the criminal prosecution should seek to introduce the resulting confession as evidence at trial, "the action itself cannot be enjoined or directed, because it is also the action of the sovereign." *Larson*, 337 U.S. at 695.

The exclusionary rule of *Miranda* "does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial." 403 U.S. at 416.

> Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.

Irvine v. California, 347 U.S. 128, 136 (1954) (quoted in *Bivens*, 403 U.S. at 413).

Earlier Courts acted on "a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence." 403 U.S. at 413. Yet the effect of exclusion, and attendant acquittal or dismissal of a criminal case, on the law enforcement officer is typically minimal: another addition to the won-loss column, and perhaps wounded pride. *See* 403 U.S. at 416 ("The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than the prosecutors or the public."). The true burden of exclusion falls upon the people as a whole, and in particular the past or future victims of crime. This cannot be the intent of the exclusionary rule, and indeed it may not be permissible.

B. The Court, No Less Than Congress, May Not Fashion a Rule to Redefine a Constitutional Right.

1. In excluding otherwise admissible evidence from a criminal trial, a court is in effect imposing a sanction upon a party litigant for its conduct outside the courtroom, prior to the

commencement of the action. No less than if it were to entertain a direct action for the same relief by the defendant against the government, the trial court in so doing is visiting liability and compulsion on the government, and through it the people, in direct contravention of the principle of sovereign immunity. *See Alden v. Maine*, 119 S. Ct. at 2268 ("the Constitution begins with the principle that sovereignty rests with the people.").

In barring the use of otherwise truthful evidence, a court uses its coercive and injunctive power to punish or redress a government actor's conduct.

> The compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Larson, 337 U.S. at 688. Exclusion has no effect upon the law enforcement officer, who is not a party to the case, and at most might be a witness. The prosecuting attorneys and the investigating officers are all certainly subject to court authority for their

conduct before the bar, but the presumed violation of the defendant's Fifth Amendment right necessarily took place before trial, outside the presiding criminal court's immediate reach.

In short, the exclusionary rule is not directed at the merits of the evidence or its probative value, but instead is an attempt to exact a penalty in response to a constitutional violation. But that penalty falls on the wrong party, namely the sovereign people; it addresses conduct not attributable to them, the conduct of the official constitutional wrongdoer. The officer at fault is usually not before the criminal court, but will nearly always, under the current system of *Bivens* and its progeny, be amenable to a private civil action.

> For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question....

Larson, 337 U.S. at 704. The continuation of *Miranda*'s exclusionary rule, in the presence of the developed alternatives of civil liability under *Bivens*, violates sovereign immunity at both the State and federal levels.

2. The Court has previously ruled, in the context of a Congressional statute that purported to enact prophylactic remedial measures against unconstitutional actions, that there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). Failure of the measure to meet this test indicates that the measure was really an attempt to rewrite the constitutional provision.

This Congress cannot do, as it alone is not empowered to amend or alter any aspect of the Constitution or its protections. U.S. Const. art. V. Yet, just as Congress, a single branch of the federal government, may not alter or amend the Constitution by itself, the same caution must guide the rulings of the Court as it interprets these constitutional rights. The Court must take care, in defining the rights of defendants under the Fifth Amendment and the actions of the government that may violate them, not to change the nature or extent

of the right in an effort to absolutely guarantee it from violation.

The right at issue in this case is the right to be free from coercion during a criminal interrogation. The right is not one to be free from the introduction of truthful evidence. The exclusion of evidence is an imprecise overreaction that does not address the specific harm, protect the right at issue, or bring its weight to bear on the appropriate wrongdoer who actually violated that right. In this sense, exclusion of evidence lacks "congruence and proportionality between the injury to be prevented or remedied and the means adjusted to that end." *City of Boerne*, 521 U.S. at 508.

If the defendant's confession in fact was voluntary, then there has been no constitutional violation. It follows therefore that no remedy would be needed. *Miranda*'s exclusionary rule in that instance becomes a cure without an ailment, and a measure that only harms society by impairing the process of justice. If the Court should maintain the exclusionary rule of *Miranda* as a constitutional imperative, the Court would in effect improperly alter the Fifth Amendment and the nature of the right to be free from self-incrimination, beyond the contours or limits within which the Framers intended it to operate.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

March 9, 2000

THEODORE M. COOPERSTEIN*

THEODORE M. COOPERSTEIN, P.C.
1815 Pennsylvania Avenue, N.W.
Suite 501
Washington, D.C. 20006
(202) 331-7895
**Counsel of Record*

Mar 9 2000

(30)

Supreme Court, U.S.
FILED
MAR - 9 2000
CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FEDERAL BUREAU OF INVESTIGATION AGENTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel
LYLE ROBERTS
1806 W. Abingdon Dr.
Apt. 202
Alexandria, VA 22314

ROBERT F. HOYT
Counsel of Record
KARAN BHATIA
HESTER PEIRCE
CHRISTOPHER SIMKINS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for Amicus Curiae

March 9, 2000

3788

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. THE CORE PROCEDURAL SAFEGUARDS UNDER *MIRANDA* WILL CONTINUE TO BE FOLLOWED UNDER SECTION 3501 11

A. Section 3501 Creates Strong Incentives for Federal Law Enforcement To Continue To Follow *Miranda*'s Core Procedural Safeguards 12

B. The FBI and Other Federal Law Enforcement Agencies Will Continue To Insist that Their Officers Follow *Miranda*'s Core Procedural Safeguards 14

II. APPLICATION OF SECTION 3501 WOULD EXPLICITLY ENCOURAGE FEDERAL LAW ENFORCEMENT OFFICERS TO FOCUS THEIR EFFORTS ON ENSURING THAT CUSTODIAL INTERROGATIONS ARE VOLUNTARY, AS REQUIRED BY THE FIFTH AMENDMENT 19

TABLE OF CONTENTS — Continued

Page

III. SECTION 3501 REMEDIES THE EXCESSES OF *MIRANDA*'S EXCLUSIONARY RULE 21

A. *Miranda*'s Exclusionary Rule Has Resulted in the Suppression of Voluntary Confessions 22

B. Section 3501 Will Prevent Voluntary Confessions from Being Suppressed 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Arizona v. Roberson,
486 U.S. 675 (1988) 15, 25, 26

Beckwith v. United States,
425 U.S. 341 (1976) 13

Edwards v. Arizona,
451 U.S. 477 (1981) 15, 25

Illinois v. Krull,
480 U.S. 340 (1987) 28

Michigan v. Mosley,
423 U.S. 96 (1975) 27

Michigan v. Tucker,
417 U.S. 433 (1974) 23, 28, 29

Miller v. Fenton,
474 U.S. 104 (1985) 20

Minnick v. Mississippi,
498 U.S. 146 (1990) 15, 25

Miranda v. Arizona,
384 U.S. 436 (1966) ..... *passim*

New Jersey v. Portash,
440 U.S. 450 (1979) 20

New York v. Quarles,
467 U.S. 649 (1984) 20, 23

Oregon v. Elstad,
470 U.S. 298 (1985) 20, 23, 29

Reese v. Delo,
94 F.3d 1177 (8th Cir. 1996) 13

Roman v. Florida,
475 So. 2d 1228 (Fla. 1985) 13

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 20

TABLE OF AUTHORITIES — Continued

Page

United States v. Arrington,
No. 97CR192, 1997 WL 754051 (N.D. Ill. Nov. 21, 1997), *aff'd*, 159 F.3d 1069 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1512 (1999) 21
United States v. Berkovich,
932 F. Supp. 582 (S.D.N.Y. 1996) 21
United States v. Bierey,
588 F. 2d 620 (8th Cir. 1978) 29
United States v. Brown,
531 F. Supp. 37 (D. Mont. 1981) 20
United States v. Rodriguez-Cabrera,
35 F. Supp. 2d 181 (D. Puerto Rico 1999) 24
United States v. Dale,
44 F. Supp. 2d 818 (E.D. Tex. 1999) 21
United States v. Davis,
512 U.S. 452 (1994) 9, 23, 25
United States v. DeSumma,
44 F. Supp. 2d 700 (E.D. Pa. 1999) 24
United States v. Dickerson,
166 F.3d 667 (4th Cir.), *cert. granted in part*, 120 S. Ct. 578 (1999) ..... *passim*
United States v. Elie,
111 F.3d 1135 (4th Cir. 1997) 3, 24
United States v. Green,
592 A.2d 985 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed as moot*, 507 U.S. 545 (1993) 26
United States v. Wyatt,
No. 97-40083-01-RDR, 1998 WL 45004 (D. Kan. Jan. 13, 1998) 21
Villafuerte v. Stewart,
111 F.3d 616 (9th Cir. 1997) 13

TABLE OF AUTHORITIES — Continued

Page

Withrow v. Williams,
507 U.S. 680 (1993) 17, 23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 11
U.S. Const. amend. V ..... *passim*
U.S. Const. amend. VI 11, 23, 29

STATUTES

18 U.S.C. § 3501 ..... 3, 8, 30
18 U.S.C. § 3501(a) 28
18 U.S.C. § 3501(b) 13, 25

BOOKS, ARTICLES & TREATISES

Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* (2d ed. 1992) 13, 25, 28
William G. Otis, Op-Ed, *Miranda: Morals and Marbles*, Wash. Post, Nov. 24, 1999, at A23 2

OTHER AUTHORITIES

Legal HandBook for Special Agents (Mar. 7, 1997) 16, 22
Memorandum from Robert C. Gleason, Deputy Chief Counsel for the Drug Enforcement Agency, to Patty Stemler, Chief of the Appellate Section, Criminal Division, Department of Justice (1998) (filed with the Court by the Government on February 24, 2000) 17, 24

TABLE OF AUTHORITIES — Continued

Page

Memorandum from Larry R. Parkinson, General Counsel for the FBI, to Eleanor D. Acheson, Assistant Attorney General (Oct. 19, 1999) (filed with the Court by the Government on February 24, 2000) ..... *passim*

Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearings Before the Subcommittee on Criminal Justice Oversight of the Senate Committee on the Judiciary, 1999 WL 16947867 (May 13, 1999) (testimony of Gilbert G. Gallegos, President Grand Lodge, Fraternal Order of Police) 24

IN THE

Supreme Court of the United States

No. 99-5525

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FEDERAL BUREAU OF INVESTIGATION AGENTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Bureau of Investigation Agents Association ("FBIAA") submits this *amicus curiae* brief in support of the decision of the United States Court of Appeals for the Fourth Circuit and in opposition to both petitioner, Charles Thomas Dickerson, and respondent, United States of America. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.[1]

[1] This brief was prepared in whole by the counsel listed on the cover. No person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

The FBIAA consists of 9800 current and former Federal Bureau of Investigation ("FBI") agents and includes approximately 75 percent of current FBI agents. Its mission is to ensure that agents employed by the FBI are treated fairly and to assist them in carrying out their law enforcement duties in an effective manner and consistent with the highest standards of professional conduct. The organization was founded in the aftermath of a highly politicized investigation in the late 1970s by the United States Attorney General in which individual FBI agents who had followed directives issued by FBI Headquarters were unjustly targeted for investigation and prosecution. The agents formed the FBIAA to represent their interests in matters in which the Government refused for political or other reasons to advocate on behalf of the agents. This is one such matter.[2]

The FBIAA has two specific interests in being heard in this case. First, the FBIAA believes it is important to clarify the factual record with respect to the manner in which Special Agent Christopher Lawlor ("Agent Lawlor") handled the investigation of the bank robbery underlying this case. Petitioner has attempted to characterize Agent Lawlor's behavior as inappropriate, Petitioner's Brief at 4-6, and the Government has abandoned any efforts to highlight the voluntariness of the statements made by Charles Dickerson.

The FBIAA's second interest in filing this brief is to challenge assertions made by the Government and former Attorney General Griffin Bell, *et al.*, in their briefs before the

---

[2] The FBIAA is not alone in feeling betrayed by the Government's refusal to stand behind section 3501. The chief attorney in the appellate section at the United States Attorney's Office resigned over this matter. *See* William G. Otis, Op-Ed, *Miranda: Morals and Marbles*, Wash. Post, Nov. 24, 1999, at A23.

Court. Both briefs suggest that the law enforcement community uniformly approves of the current *Miranda* rules and sees no need to apply 18 U.S.C. § 3501 in federal criminal cases. In fact, the FBIAA and its members strongly disagree with this position.[3] FBI agents support the application of section 3501 because the statute, while creating strong incentives to provide *Miranda* warnings, supports the efforts of law enforcement by emphasizing the constitutional rights the warnings are designed to safeguard, rather than the warnings themselves.

STATEMENT OF THE CASE

The facts of this case offer a perfect example of why section 3501 should be upheld. While in custody, Dickerson made a confession. The District Court found it had been made voluntarily.[4] The court suppressed the confession, however, because it believed the law enforcement agents had failed to give Dickerson timely *Miranda* warnings.

---

[3] The FBIAA is not alone in its support of the Fourth Circuit's decision upholding section 3501. The International Association of Chiefs of Police, the National Association of Police Organizations, the Fraternal Order of Police, and the National District Attorneys Association, and numerous other state prosecuting associations have likewise filed briefs supporting the Fourth Circuit's decision. These organizations collectively represent thousands of law enforcement personnel, in contrast to the relatively small number of *individuals* who have joined the Bell Brief.

[4] The District Court's acknowledgment of the voluntariness of Dickerson's confession was implicit in the District Court's reliance on *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997), to reject his argument that his accomplice's testimony was tainted by an alleged violation of his constitutional rights. J.A. 158 n.1. *See United States v. Dickerson*, 166 F.3d 667, 676 (4th Cir) (noting that "[b]ecause Dickerson's statement was voluntary under the Fifth Amendment, the district court concluded that the evidence found as a result thereof was admissible at trial"), *cert. granted in part*, 120 S. Ct. 578 (1999).

In fact, as the Government itself urged in a petition for reconsideration to the District Court and as the following summary of facts explains, there is strong reason to believe that no departure from *Miranda* procedures occurred at all. Dickerson himself indicated in a handwritten note that he had timely received his warnings. The Government's failure to introduce this and other probative evidence in the suppression hearing resulted in a conclusion by the District Court that a technical violation of Miranda had occurred and, accordingly, that it was compelled to suppress Dickerson's voluntary confession. It is precisely situations such as this that section 3501 is designed to remedy.

In the late afternoon of January 27, 1997, Agent Lawlor and ten other federal and local law enforcement officers arrived in the Maryland neighborhood where Charles Thomas Dickerson lived. J.A. 141. Witnesses had observed a car registered to Dickerson near the scene of the robbery of a bank in Alexandria, Virginia three days earlier. *Id.* After locating the car and looking around the neighborhood, several of the officers approached Dickerson's door. *Id.* The agents knocked and identified themselves. *Id.* Dickerson, through the closed door, told the agents to wait. J.A. 39. A few minutes later, Dickerson opened the door and the agents entered.[5] *Id.* The agents told Dickerson he was not under arrest, but asked him to accompany them voluntarily to the FBI field office to discuss the bank robbery. J.A. 101-02 (Affidavit of Thomas O. Durkin ¶ 5). Dickerson agreed and, followed by Agent Lawlor and one or two other agents, went to the bedroom to get his coat. J.A. 141. Underneath the coat was over $500, which Dickerson claimed he had won gambling in Atlantic City. *Id.* The

[5] Dickerson subsequently told Agent Lawlor that while the agents waited outside, he hid the gun he had in hand when the agents knocked on the door. J.A. 63-64. In his testimony before the District Court, Dickerson denied having said this. J.A. 64.

agents asked Dickerson whether they could search his apartment. J.A. 142. Dickerson declined. *Id.* Dickerson nevertheless rode with Special Agents Lawlor and Armin Showalter to the FBI field office. J.A. 102 (Durkin Aff. ¶ 7). Detective Thomas O. Durkin, a twenty-year veteran of the Alexandria Police Department, followed in a separate car. *Id.* Four FBI agents remained in the vicinity of Dickerson's apartment. J.A. 108 (Affidavit of Lawrence Kevin Wenko ¶ 6).

Once at the office, Agent Lawlor and Detective Durkin took Dickerson to an interview room, but reminded him that he was free to go and, should he choose to leave, would be given a ride home. J.A. 102 (Durkin Aff. ¶ 8). Dickerson told Agent Lawlor and Detective Durkin that he had been near the bank on the morning of January 24, 1997, but denied involvement in or knowledge of the robbery. J.A. 142.

Agent Lawlor, armed with the knowledge that Dickerson had been in the vicinity of the bank at the time of the robbery, called Magistrate Judge James E. Kenkel to get a warrant to search Dickerson's apartment. J.A. 142. Agent Lawlor explained that a telephonic warrant was necessary because Dickerson was free to leave at any time and Agent Lawlor was worried that, should Dickerson leave, critical evidence would be destroyed. *Id.* The magistrate judge determined that there was probable cause to search Dickerson's apartment and issued a warrant for that purpose at 8:50 p.m. J.A. 142-43. Between 9:00 and 9:15 p.m., Agent Lawlor contacted Special Agent Lawrence Kevin Wenko, who had remained in the vicinity of Dickerson's apartment. J.A. 108 (Wenko Aff. ¶ 7). The search by Wenko and the other agents proved fruitful: among other items, they found a loaded semi-automatic .45 caliber handgun allegedly used in the robbery, dye-stained money

and a bait bill, which was traced to another bank robbery.[6] J.A. 144.

After notifying the agents that had remained in Dickerson's neighborhood of the search warrant, Agent Lawlor returned to the interview room to tell Dickerson that his apartment would be searched. J.A. 143. The District Court found that, upon hearing about the search, Dickerson decided to make a statement. *Id.* According to the District Court's findings, a half hour long interview followed. J.A. 155. The District Court found that Dickerson did not receive his *Miranda* warnings until the interview was over. *Id.*

The evidence introduced by the Government after the District Court had made its finding with respect to the *Miranda* procedures supports the contrary sequence of events described below.[7] After Agent Lawlor informed Dickerson that his apartment was being searched, Dickerson decided he wanted to give a statement. J.A. 143. Agent Lawlor left Dickerson and Detective Durkin alone. J.A. 102 (Durkin Aff. ¶ 10). When he returned, Dickerson was read his *Miranda* rights, *id.*, and at 9:40 p.m. Dickerson signed a waiver of those rights. J.A. 21. Dickerson did not alter his earlier story. J.A. 102 (Durkin Aff. ¶ 10). Agent Lawlor left the room again in response to a page. *Id.* During Agent Lawlor's absence, Detective Durkin asked Dickerson to write down what he had done during the day. J.A. 103

---

[6] Aside from linking him to bank robberies, the evidence discovered in Dickerson's apartment tied him to an armed car-jacking, during which a gun later used to murder an off-duty correctional officer was taken. J.A. 86. Additional items further implicating Dickerson in this or other bank robberies later were seized from the trunk of Dickerson's car. J.A. 144-45.

[7] This evidence included the affidavits of Detective Durkin (J.A. 101-04) and Agent Wenko (J.A. 107-12) and Dickerson's handwritten note described below (J.A. 105).

(Durkin Aff. ¶ 11). Dickerson composed the following note (J.A. 105):

> I was read my rights at 7:30[8] But I was here at 5:30. I talked to the two Detectives[,] Detective Thomas Durkin and Agent Lawlor [for] two and a half hours and then was asked to take a polygraph test[.] I declined because after two hours I had knowledge of the bank robbery. I told them I know nothing of the bank robbery that happened Friday. Be for[e] today I didn't have any knowledge of the bank robbery.

Upon returning to the room, Agent Lawlor told Dickerson that a bait bill from another bank robbery had been found in his apartment. J.A. 103 (Durkin Aff. ¶ 12). Dickerson then confessed that he had been near the bank in Alexandria, Virginia on January 24, 1997, with "Jimmy" (later identified as James Rochester), someone he knew to be a bank robber.[9] J.A. 103 (Durkin Aff. ¶ 12).

Unfortunately, the District Court declined to consider the newly introduced evidence suggesting that Dickerson timely received his *Miranda* warnings; it found that the delay in introducing the evidence was attributable to the Government's lack of preparation for the initial suppression hearing.[10] J.A. 159-60. The District Court's determination

---

[8] As Detective Durkin explained, Dickerson did not correctly estimate the time at which he wrote the note. J.A. 103 (Durkin Aff. ¶ 11). The Fourth Circuit acknowledged that the handwritten statement, regardless of its timing problems, "corroborates the agents' position that Dickerson was read his *Miranda* warnings prior to his confession." *Dickerson*, 166 F.3d at 677 n.8.

[9] Dickerson had assisted Rochester in washing the dye off bills obtained in earlier robberies. J.A. 103 (Durkin Aff. ¶ 12).

[10] At the hearing on the motions for reconsideration, the District Court observed that "I suspect it's one of these deals where they threw the file at [the Assistant United States Attorney] at 4 o'clock on the day before." J.A. 129.

that Dickerson did not receive the *Miranda* warnings in a timely fashion, however, does not detract from the undisputed evidence that Dickerson spoke with Agent Lawlor and Detective Durkin voluntarily.

We recount these facts, not to raise in this Court our dispute with the District Court findings, but to emphasize precisely why this case demonstrates the wisdom and the need for section 3501. No one disputes that Dickerson's confession was voluntary, and not the result of any coercion. The only issue in dispute was the technical issue of whether he was read his *Miranda* warnings before or after the confession. Under *Miranda*, the District Court ended its inquiry and suppressed Dickerson's confession once the Court determined, apparently on an incomplete record, that the warnings were given after the confession. Under section 3501, the Court's decision on suppression would not have been held hostage to that technical point, but instead would have been based on the broader constitutional principle of whether or not the confession was voluntary.

SUMMARY OF ARGUMENT

On behalf of its constituent members, who include approximately 75 percent of all active FBI agents, the FBIAA offers this brief in support of the Fourth Circuit's decision upholding 18 U.S.C. § 3501 as the standard governing the admission into evidence of voluntary confessions in federal criminal cases.[11]

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court established a set of procedures that must be followed when a suspect is in police custody before the police may elicit a confession: The police must give certain warnings and ask

[11] *See Dickerson*, 166 F.3d at 684-92.

whether the suspect agrees to waive his rights. If the suspect refuses to waive his rights (*i.e.*, declines to give his permission to be questioned), the police may not question the suspect. An accompanying exclusionary rule requires the suppression of the suspect's confession if the police deviate from these procedures, without regard to the actual voluntariness of the confession.

Subsequent decisions by the Court, however, have stressed that the *Miranda* procedures are not themselves constitutional rights, but rather are "recommended 'procedural safeguards'"[12] that help protect an underlying constitutional right – *i.e.*, the Fifth Amendment right against self-incrimination. Because the safeguards are not constitutionally required, they can be superseded or altered by Congress. Congress did just that in enacting section 3501, which directs courts to admit into evidence confessions that are "voluntary," as determined by weighing "all the circumstances surrounding the giving of the confession," including the giving of *Miranda* warnings and the presence of counsel during questioning. The Fourth Circuit held that section 3501 is a constitutional exercise of Congress's power and that this statute establishes the standard for the admission of confessions in federal criminal cases. For the reasons stated in the brief filed by Professor Paul Cassell, the FBIAA believes that the Fourth Circuit's decision is correct.

Aside from the question of section 3501's validity, the FBIAA supports section 3501 as a matter of policy because it remedies the overinclusive application of *Miranda*'s exclusionary rule, yet still provides protections for individuals' constitutional rights without materially

[12] *United States v. Davis*, 512 U.S. 452, 457-58 (1994); *see also Miranda*, 384 U.S. at 444 (requiring the "use of *procedural safeguards* effective to secure the privilege against self-incrimination") (emphasis added).

complicating the procedures law enforcement must follow in eliciting confessions. In expressing its support for section 3501, the FBIAA makes three points. First, by affirming the Fourth Circuit's decision and upholding section 3501, the Court will not do away with adherence to *Miranda*'s core procedural safeguards.[13] To the contrary, section 3501 creates a powerful incentive for law enforcement officers to follow these procedures by making them factors in determining the voluntariness of a confession. This incentive is bolstered by non-statutory incentives. For example, regardless of the status of section 3501, the FBI – with the support of its agents – is committed to maintaining these safeguards. This commitment stems not only from a recognition of the legal benefits of the safeguards as evidence of voluntariness, but also from its respect for constitutional rights and public expectations.

Second, the FBIAA challenges the assertion of Dickerson, the Government, and supporting *amici* that upholding section 3501 would blur the "bright line" that courts have used in assessing the admissibility of a confession, thereby complicating the job of law enforcement officers. This argument ignores the fact that even when

[13] In the brief filed by former U.S. Attorney General Griffin Bell, *et al.*, *amici* imply as a basis for their arguments that if section 3501 is the governing standard, *Miranda*'s procedural safeguards, including the giving of warnings, will no longer be followed. *See* Bell Brief at 17-18 (some law enforcement agencies "may" choose to voluntarily continue to give *Miranda* warnings, but some "may short-sightedly dispense with warnings and adopt more aggressive interrogation techniques"). In making these assertions, *amici* claim to be speaking for the vast majority of law enforcement. *See id.* at 1, 7-8. However, as noted above, the FBIAA, as the representative of 75 percent of all active FBI agents, is better positioned to speak for the federal agents who actually deal with *Miranda* and its aftermath on a day-to-day basis. The FBIAA asserts, for the reasons discussed in this brief, that *Miranda*'s safeguards will continue to be followed, regardless of whether the Court affirms the Fourth Circuit's decision.

Miranda's safeguards are followed, a confession still cannot be admitted as evidence until a trial judge determines that the confession is voluntary under the Fifth Amendment. In determining the voluntariness of the confession, a trial judge applies the same "totality of the circumstances" analysis required by section 3501. Since the "voluntariness" of a confession is already a prerequisite to its admission, a fact of which law enforcement officers are keenly aware, section 3501's voluntariness standard will not place any additional burdens on law enforcement.

Finally, the FBIAA supports the application of section 3501 because it counteracts the overinclusiveness of *Miranda*'s exclusionary rule, which calls for voluntary confessions to be suppressed whenever there is a technical violation of *Miranda*'s procedural safeguards. By basing the test for the admission of a confession on whether there has actually been a violation of the Fifth Amendment, section 3501 makes for better law enforcement policy by lessening the harsh and unfair consequences that result in the rare instance a law enforcement agent inadvertently fails to follow *Miranda*'s safeguards. It also brings the exclusionary rule applied to confessions into harmony with the exclusionary rule applied in other criminal procedure contexts arising under the Fourth, Fifth, and Sixth Amendments.

ARGUMENT

I. THE CORE PROCEDURAL SAFEGUARDS UNDER *MIRANDA* WILL CONTINUE TO BE FOLLOWED UNDER SECTION 3501.

The briefs filed by Dickerson and supporting *amici*, assume that if the Fourth Circuit decision is affirmed and section 3501 upheld, federal law enforcement will stop following

Miranda's core procedural safeguards.[14] This assumption is wrong. For a variety of reasons, law enforcement will continue to adhere to core *Miranda* safeguards.

A. Section 3501 Creates Strong Incentives for Federal Law Enforcement To Continue To Follow *Miranda*'s Core Procedural Safeguards.

Section 3501 directs courts to admit into evidence confessions that are "voluntarily given" and states that whether a particular confession is voluntary should be determined by weighing "all the circumstances surrounding the giving of the confession." In determining voluntariness, the trial judge "shall" examine a number of factors, including:

> (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him[;] (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

18 U.S.C. § 3501(b)(3)-(5). These factors encapsulate the substance of *Miranda*'s core procedural safeguards.

By explicitly including *Miranda*'s procedural safeguards as factors in the voluntariness analysis, section 3501 reflects the holding of numerous cases that, under the Fifth

---

[14] *See* Petitioner's Brief at 14 ("While the Court invited alternative procedures [for providing warnings], it did not invite procedures that dispensed with apprising persons in custody at the outset of their rights and assuring that their exercise of those rights would be honored."); Bell Brief at 17-19.

Amendment, the giving of warnings is significant proof that the confession was voluntary.[15] Law enforcement officers, understanding the relative weight given to warnings and the presence of counsel under section 3501, will continue to view the core *Miranda* procedural safeguards as the best way to ensure that any subsequent confession is found to be voluntary.[16] Section 3501 creates a "win-win" situation: federal law enforcement officers will continue to give the *Miranda* warnings, but in cases involving a technical departure from the *Miranda* safeguards, the constitutional requirement of voluntariness will be the basis for determining the admittance of any confession into evidence.

---

[15] *See, e.g., Beckwith v. United States*, 425 U.S. 341, 348 (1976) ("Proof that some kind of warnings were given or that none were given would be relevant evidence . . . on the issue of whether the questioning was in fact coercive."); *Villafuerte v. Stewart*, 111 F.3d 616, 626 (9th Cir. 1997) ("In analyzing whether statements were voluntary, we must consider the totality of the circumstances. . . . We conclude [the criminal defendant] was fully apprised of his *Miranda* rights and voluntarily waived them."); *Reese v. Delo*, 94 F.3d 1177, 1184 (8th Cir. 1996) (under a "totality of the circumstances" review, "[t]he fact that [*Miranda*] warnings were given weighs in favor of a voluntariness finding"); *Roman v. Florida*, 475 So. 2d 1228, 1232 (Fla. 1985) ("Proof that *Miranda* warnings were given is relevant in determining whether there was coercion. Proof even of partial warnings of constitutional rights is a circumstance relevant to a finding of voluntariness."); *see also* Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.2(c), at 298 (2d ed. 1992) ("[T]he fact the warnings were given is an important factor tending in the direction of a voluntariness finding.").

[16] *See* Brief of United States at 33 (where a criminal suspect challenges the admissibility of a confession despite being given *Miranda* warnings, "compliance with *Miranda* helps ensure that statements will be found admissible because they were voluntary").

B. The FBI and Other Federal Law Enforcement Agencies Will Continue To Insist that Their Officers Follow *Miranda*'s Core Procedural Safeguards.

The FBI, with the support of its agents, and other federal law enforcement agencies will continue to insist that the core *Miranda* procedural safeguards are followed. As stated by the General Counsel of the FBI in an October 19, 1999, memorandum submitted to the Department of Justice: "Whether or not the *Miranda* requirements remain in effect after *Dickerson*, the FBI will continue to warn subjects of their rights to silence and counsel, and obtain waivers of those rights, prior to custodial interrogation."[17] Apart from the legal incentive created by section 3501, *see supra* Part I.A, there are three significant reasons why the FBI and other federal law enforcement agencies will maintain their current procedures if the Court upholds section 3501. First, the FBI procedure of giving warnings to suspects pre-dates the *Miranda* decision and is ingrained in the FBI's internal policies. Like other federal law enforcement agencies, the FBI will continue to train its agents to follow *Miranda*'s procedural safeguards. Second, federal prosecutors will expend their limited resources more readily on cases in which indicia of voluntariness, including the core *Miranda* safeguards, are present. Finally, public expectations will encourage continued use of *Miranda*'s core procedural safeguards.

The FBI has a long history, predating the *Miranda* decision, of giving warnings to suspects in order to protect their constitutional rights. As the Court explained in *Miranda*, J. Edgar Hoover, Director of the FBI, had instituted warnings to suspects as early as 1952, although

[17] *See* Memorandum from Larry R. Parkinson, General Counsel for the FBI, to Eleanor D. Acheson, Assistant Attorney General at 1 (Oct. 19, 1999) (filed with the Court by the Government on February 24, 2000) [hereinafter FBI Memorandum].

without an accompanying exclusionary rule.[18] The FBI stressed that "'Special Agents are taught that any suspect or arrested person, at the outset of an interview,'" must be informed of his right to remain silent and to have "'the services of an attorney of his own choice.'" *Miranda*, 384 U.S. at 483 n.54. The purpose behind these warnings was to "'maintain inviolate the historic liberties of the individual'" and to enforce the law without "'destroy[ing] the dignity of the individual.'" *Id.* (quoting Hoover).

Likewise, today each FBI agent is trained to respect individual rights while seeking confessions. The FBI's current training materials state:

> The most important limitations on the admissibility of an accused's incriminating statements are the requirements that they be voluntary; that they be obtained without violating his right to remain silent; and that they be obtained without violating his right to a lawyer.

Legal HandBook for Special Agents § 7-1 (Mar. 7, 1997).[19] Agents are specifically told that "[i]t is the policy of the FBI

[18] While the *Miranda* decisions states that the FBI warnings under Hoover were accompanied by a cutting off of questioning once a suspect asked for a lawyer, *see Miranda*, 384 U.S. at 485-86 (quoting a letter sent from the FBI to the Solicitor General in connection with the *Miranda* case), members of the FBIAA who were working as agents prior to the *Miranda* decision do not remember such a rule. Their recollection is that the *Miranda* decision materially altered the landscape of law enforcement with regard to questioning suspects. Moreover, even as explained in *Miranda*, Hoover's rule was not nearly as broad with respect to cutting off of questioning as the subsequent expansions of this rule in *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675, 682-83 (1988), and *Minnick v. Mississippi*, 498 U.S. 146 (1990). *See infra* Part III.B.

[19] These materials make no reference to *Miranda*, but simply assert that these procedures are part of the FBI's internal policies.

that no attempt be made to obtain a statement by force, threats, or promises," and that it is entirely up to the individual suspect, "after being advised of his/her rights," whether to give a confession or invoke the right to silence. *Id.* § 7-2.1(1). Agents are instructed that "an accused in custody is entitled to be warned of his right to remain silent and his right to an attorney" before any interrogation begins. *Id.* § 7-3.1.[20]

The FBI's policy dictating that agents give warnings is derived not only from a respect for individual rights, but also is meant to ensure that a court will find any subsequent confession voluntary. The *Legal HandBook* specifically instructs agents that the "[a]dvice of rights" is an important element in making sure that confessions are "the result of 'free and unconstrained choice,'" and that the giving of warnings will be used as a factor by courts in their "'totality of the circumstances'" analysis. *Id.* § 7-2.3. Agents face disciplinary sanctions for gross violations of these FBI procedures. In short, these procedures are deeply ingrained in the FBI's culture and, as the FBI has stated, it has no intention of changing them if section 3501 is upheld, nor would the FBIAA urge any such change.[21]

---

[20] In the *amicus* brief filed by the ACLU, the argument is made that *Miranda* warnings are still needed today because many law enforcement manuals encourage police officers to use coercive tactics to gain confessions. *See* ACLU Brief at 15-16. The FBIAA will leave it to organizations representing state law enforcement agencies appearing as *amici* to speak for themselves. The FBI and its agents eschew the use of such tactics. The FBI has consistently maintained a policy of respecting constitutional rights and, in fact, spends much effort in training agents on conducting interrogations with the utmost professionalism within the parameters the law has set.

[21] *See supra* note 17 and accompanying text. The Court has noted law enforcement's general willingness to respect individuals' constitutional rights and to provide safeguards for doing so, such as the giving of warnings:

Although the above discussion is confined to the FBI's procedures, other federal law enforcement agencies will have similar incentives to leave in place their procedures for adhering to the *Miranda* safeguards.[22] Overall, therefore, the Court's decision in this case is unlikely to affect the methods employed by federal law enforcement agencies to protect the constitutional rights of suspects.

More generally, federal law enforcement agents are faced with increasing pressure to bring "air tight" cases devoid of technical difficulties to federal prosecutors. Under the current *Miranda* regime, a federal prosecutor likely will not pursue a case that relies on the defendant's confession if there is any chance that the defendant will be able to invoke *Miranda*'s exclusionary rule.[23] While it is true that under

---

> We must remember in this regard that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements.

Withrow v. Williams, 507 U.S. 680, 695 (1993).

[22] Other federal agencies, in addition to the FBI, have expressed a commitment to continue following *Miranda*'s safeguards under section 3501. *See* Memorandum from Robert C. Gleason, Deputy Chief Counsel for the Drug Enforcement Agency, to Patty Stemler, Chief of the Appellate Section, Criminal Division, Department of Justice (1998) (filed with the Court by the Government on February 24, 2000) ("Regardless of any change in the rule by the Supreme Court, DEA will undoubtedly counsel its Agents to continue to provide *Miranda* warnings to all custodial subjects that they seek to question.") [hereinafter 1998 DEA Memorandum].

[23] Former Attorney General Benjamin Civiletti acknowledges as much in his *amicus* brief. He states that federal prosecutors have tremendous incentives to take cases where *Miranda* warnings have been given because this helps assure that a "critical aspect of the government's proof [*i.e.*, a voluntary confession] is admissible." Civiletti Brief at 5. While Mr. Civiletti's comments are aimed at the current regime under *Miranda*, his point translates into the section 3501 context and suggests that there

section 3501 prosecutors will more readily accept cases in which confessions were voluntary despite a technical violation of the *Miranda* safeguards, given the need for proof of voluntariness under section 3501, and the legal and practical reality that the giving of warnings helps provide this proof, federal prosecutors will continue to put pressure on law enforcement to follow *Miranda*'s procedural safeguards.[24]

Finally, federal law enforcement agencies will be encouraged to follow *Miranda*'s core procedural safeguards by the public's expectation that suspects be treated fairly and within the bounds of the law. Dickerson, the Government, and supporting *amici* have identified the increase in public confidence in law enforcement attributable to the provision of *Miranda* warnings. The FBIAA agrees that the use of *Miranda* warnings has enhanced the public's perception of the professionalism of law enforcement officers. There is no reason to believe that the FBI or other federal law enforcement agencies would compromise these gains by refusing to give the warnings under a section 3501 regime. Section 3501, with its totality of the circumstances approach, enhances the need for federal law enforcement agencies to be vigilant in fostering a favorable public perception of their behavior towards suspects.

---

will continue to be such pressure on federal prosecutors, and hence federal law enforcement, to give *Miranda* warnings.

[24] In the brief filed by former Attorney General Bell, *amici* argue that if *Miranda*'s safeguards are not mandatory, "the prosecutor's evidentiary interest in assuring that warnings have been provided will become attenuated." Bell Brief at 18. The truth is exactly the opposite. As explained above, prosecutors will have tremendous incentives to continue putting pressure on law enforcement agents to follow *Miranda*'s safeguards as the surest way to prove voluntariness under section 3501.

II. APPLICATION OF SECTION 3501 WOULD EXPLICITLY ENCOURAGE FEDERAL LAW ENFORCEMENT OFFICERS TO FOCUS THEIR EFFORTS ON ENSURING THAT CUSTODIAL INTERROGATIONS ARE VOLUNTARY, AS REQUIRED BY THE FIFTH AMENDMENT.

Dickerson, the Government, and supporting *amici* argue that *Miranda* provides federal law enforcement officers with "bright line" rules to assist them in questioning suspects.[25] They contend further that officers would be plagued by uncertainty when they questioned a subject if section 3501 controlled the admissibility of confessions, because the officers would not be able to predict what factors a court might consider in examining the totality of the circumstances surrounding the confession.[26] This argument ignores the fact that even under *Miranda*, a federal law enforcement officer must be prepared for a totality of the circumstances analysis. Although the *Miranda* procedural safeguards serve as a useful guide for law enforcement, it is a fallacy to suggest that law enforcement officers, simply by following *Miranda*, can ensure that suspects' confessions will be admitted into evidence.[27] The voluntariness standard established by the Fifth Amendment remains the fundamental criterion for admission.

Before any self-incriminating statement can be admitted in federal court, a trial judge must determine both (1) *Miranda* compliance (including whether there was a waiver) and (2) the voluntariness of the statement for due process

---

[25] *See* Petitioner's Brief at 43; Brief of United States at 50; Bell Brief at 12.

[26] *See* Brief of United States at '38; Brief of House Democratic Leadership at 7.

[27] *See* Bell Brief at 12, 19.

purposes.[28] At the behest of the defendant, a court will make both determinations. If an officer complied with *Miranda*, the court must consider a defendant's remaining voluntariness arguments. *See New York v. Quarles*, 467 U.S. 649, 672 & n.5 (1984). On the other hand, if the officer violated *Miranda*, the court still must determine the voluntariness of the statement, because voluntariness governs the use of the statement for impeachment purposes, *see New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979), and affects the "fruits of the poisonous tree" analysis, *see Oregon v. Elstad*, 470 U.S. 298, 306-09 (1985). In this case, for example, the District Court found a violation of *Miranda* and thus excluded the confession from the government's case-in-chief, J.A. 155, but still went on to determine that Dickerson's confession was voluntary and thus did not require suppression of the evidence found as a result of the confession, J.A. 158 n.1. A determination of voluntariness is based on the totality of the circumstances surrounding the confession, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), the same analysis used in section 3501.

Because suppression hearings are routine events in cases involving confessions, law enforcement officers must do more than simply afford the suspect the proper procedural safeguards. Under both *Miranda* and section 3501, an officer must take into consideration the myriad factors a court might evaluate in determining voluntariness based on the totality of the circumstances.[29] Despite the parties'

---

[28] *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109-10 (1985) (despite *Miranda* warnings being given, a court must still ask whether confession was voluntary under the due process clause); *United States v. Brown*, 531 F. Supp. 37, 39 (D. Mont. 1981) ("even in the event the required warnings are given, the prosecution is still required to show that a confession was voluntary under the due process standards").

[29] These factors include all of the "pre-*Miranda* factors" identified by the Bell Brief as bearing on the voluntariness inquiry. Bell Brief at 14 n.14. The Bell Brief appears to suggest that these factors are no longer

claims about the complications federal law enforcement officers would face under section 3501, it is clear that the burden on officers would not materially change. If anything, section 3501 lessens the burden on federal law enforcement officers by allowing them to focus their efforts on ensuring that confessions are voluntary, rather than worrying about whether a technical violation of a procedural safeguard will result in the suppression of crucial evidence. Thus, section 3501 enhances protection for suspects' constitutional rights without undermining the bright line guidance offered by the core *Miranda* safeguards.

III. SECTION 3501 REMEDIES THE EXCESSES OF *MIRANDA*'S EXCLUSIONARY RULE.

The FBIAA, following the lead of the FBI, supports the continued use of *Miranda*'s core procedural safeguards in an effort to protect individuals' constitutional rights.[30]

---

relevant under the "bright-line rules" of *Miranda*. *Id.* at 12-19. This argument is contravened by the fact that federal courts routinely consider the factors identified by the Bell Brief as "pre-*Miranda*" in determining whether to admit confessions into evidence, even when all of the *Miranda* procedural safeguards have been followed. *See, e.g., United States v. Dale*, 44 F. Supp. 2d 818, 820 (E.D. Tex. 1999) (finding oral statements voluntary after consideration of alleged threats and alleged denials of requested counsel by law enforcement agents); *United States v. Wyatt*, No. 97-40083-01-RDR, 1998 WL 45004, at *3 (D. Kan. Jan. 13, 1998) (considering whether defendant was under the influence of drugs or alcohol when he made his statements after receiving *Miranda* warnings); *United States v. Arrington*, No. 97CR192, 1997 WL 754051, at *1-2 (N.D. Ill. Nov. 21, 1997) (rejecting defendant's argument that alleged threats against wife rendered his confession involuntary), *aff'd*, 159 F.3d 1069 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1512 (1999); *United States v. Berkovich*, 932 F. Supp. 582, 587 (S.D.N.Y. 1996) (finding statements voluntary based, among other things, on assessment of defendant's intelligence and the location of the interrogation).

[30] The FBIAA fully supports the FBI's policy positions outlined in the FBI Memorandum discussed above. *See supra* note 17 and

However, the exclusionary rule established by *Miranda*, and expanded in subsequent cases, is overinclusive because it results in confessions being suppressed when there has been no violation of a constitutional right. Confessions are often thrown out because of "technicalities,"[31] *i.e.*, failures to follow the letter of *Miranda*'s safeguards. The effect has been to limit unduly law enforcement's ability to fight crime, while allowing the release of confessed criminals back into society.

Section 3501 makes for better law enforcement policy because it would continue to exclude confessions when the court finds a constitutional violation, but would not exclude confessions that are found to have been given voluntarily despite the existence of technical departures from *Miranda*'s core safeguards. This remedies some of the anomalous results stemming from *Miranda*'s exclusionary rule and parallels the applications of the exclusionary rule in other criminal procedure contexts.

A. *Miranda*'s Exclusionary Rule Has Resulted in the Suppression of Voluntary Confessions.

The Fifth Amendment right against self-incrimination guarantees each individual "the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda*, 384 U.S. at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). Protection of this Fifth Amendment right was at the heart of the Court's concerns in *Miranda* and was the reason for creating a system of procedural safeguards to assure that involuntary confessions are not used in criminal trials. *Miranda*, 384 U.S. at 439 ("[W]e

---

accompanying text. The FBIAA also supports the policies outlined in the FBI's *Legal HandBook for Special Agents*. *See supra* Part I.B.

[31] *Dickerson*, 166 F.3d at 692.

deal with . . . his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.").[32]

To give teeth to its protective scheme, *Miranda* established an exclusionary rule that requires adherence to *Miranda*'s procedural safeguards as a "prerequisite[] to the admissibility of any statement made by a defendant." *Miranda*, 384 U.S. at 476. The *Miranda* exclusionary rule, however, is broader than is needed to protect a suspect's Fifth Amendment rights – sweeping away any confession that is given in violation of *Miranda*'s procedural safeguards without regard for the voluntariness of the confession. The result is that in some situations a confession is suppressed without any finding by a district court that a constitutional violation, in fact, has occurred.[33]

The overbreadth of this rule creates pitfalls for law enforcement.[34] An agent who inadvertently departs from

---

[32] While the procedural safeguards established by *Miranda* include a warning that the criminal suspect has the right to speak to a lawyer, the purpose of this warning is to protect the Fifth Amendment right against self-incrimination, rather than the Sixth Amendment right to counsel. *See Miranda*, 384 U.S. at 465-66 (a lawyer's presence "would insure that statements made in the government-established atmosphere are not the product of compulsion"); *see also United States v. Davis*, 512 U.S. 452, 456 (1994) ("The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings . . . .").

[33] The Court has repeatedly held that a violation of *Miranda*'s procedural safeguards does not necessarily mean that a resulting confession is involuntary, and hence in violation of the Fifth Amendment. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 705-07 (1993) (O'Connor, J., concurring in part and dissenting in part); *Oregon v. Elstad*, 470 U.S. 298, 306-10 (1985); *New York v. Quarles*, 467 U.S. 649, 672 & n.5 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444-46 (1974).

[34] In its brief, the Government acknowledges that there have been costs to law enforcement from the exclusionary rule, but states in a conclusory fashion that the exclusionary rule does not impede law enforcement unduly. *See* Brief of United States at 31-32. The brief dismisses

Miranda's procedural safeguards before a suspect voluntarily confesses will see that confession suppressed at trial, even if the agent did not violate the suspect's constitutional rights.[35] As detailed above, the facts of this case are a pointed example of this pitfall. Although the Government presented evidence that Dickerson was properly given his *Miranda* warnings, the District Court found that *Miranda*'s technical requirements had not been followed and suppressed Dickerson's confession, despite the fact that it was voluntary. *See Dickerson*, 166 F.3d at 675-77.

The exclusionary rule is especially harmful in the context of questioning suspects after they have requested the assistance of counsel.[36] In *Miranda*, the Court held that if a suspect "states that he wants an attorney, the interrogation must cease until an attorney is present" and the attorney must be "present during any subsequent questioning." *Miranda*,

---

research to the contrary and overlooks the experiences of law enforcement officials who have spoken out against the exclusionary rule and have criticized *Miranda* for "interfer[ing] with the ability of police officers to solve violent crimes and take dangerous criminals off the streets." *Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearings Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 1999 WL 16947867 (May 13, 1999) (Testimony of Gilbert G. Gallegos, President Grand Lodge, Fraternal Order of Police) (the exclusionary rule under *Miranda* "prevents the use of any information obtained if there is the slightest hint of noncompliance").

[35] *See, e.g., United States v. Elie*, 111 F.3d 1135, 1139, 1142 (4th Cir. 1997) ("On appeal, the Government does not contend that the district court erred in suppressing the statements Elie made prior to receiving his *Miranda* warnings."; "[Defendant's] statement was voluntary under the Fifth Amendment."); *United States v. DeSumma*, 44 F. Supp. 2d 700, 705-06 (E.D. Pa. 1999); *United States v. Rodriguez-Cabrera*, 35 F. Supp. 2d 181, 185-87 (D. Puerto Rico 1999).

[36] The FBI and the DEA have voiced similar concerns in their memoranda submitted to the Court by the Government. *See* FBI Memorandum, *supra* note 17, at 1-2; 1998 DEA Memorandum, *supra* note 22.

384 U.S. at 474. In *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675, 682-83 (1988), and *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court created a "'second layer of prophylaxis'" regarding a suspect's request for the assistance of counsel, *see United States v. Davis*, 512 U.S. 452, 458 (1994).[37] In these cases, the Court held that once counsel has been requested, law enforcement is forbidden from ever questioning the suspect again unless an attorney is present, even if the suspect is again given *Miranda* warnings and voluntarily responds to subsequent questioning, or already has had the opportunity to consult with an attorney.[38] Even if the later interrogation relates to another crime and is conducted by a different set of law enforcement officers, any confessions must be excluded because of the invocation of the right to counsel in the earlier, unrelated context.[39]

The effect of these cases has been to render many suspects "question proof" because of the threat that any

---

[37] The Government, while recognizing the harmful effects of these cases, argues that addressing the extensions of *Miranda* found in this line of cases should be saved for another day. *See* Brief of United States at 35-36. This fails to recognize that any decision on the validity of section 3501 necessarily implicates the decisions in *Edwards*, *Roberson*, and *Minnick* because section 3501 directs that courts "shall" admit into evidence voluntary confessions, whether or not suspects request the assistance of counsel. Of course, whether law enforcement officers honor such requests will most assuredly bear on the issue of voluntariness (or the lack thereof). *See* 18 U.S.C. § 3501(b) (court must consider "whether or not [the] defendant was without the assistance of counsel when questioned and when giving [the] confession").

[38] *See Minnick*, 498 U.S. at 151-52; *Edwards*, 451 U.S. at 484-85; *see also* LaFave & Israel, *supra* note 15, § 6.9, at 345 (*Edwards* is "best viewed as creating a *per se* rule proscribing any interrogation of an accused who has invoked his right to counsel").

[39] *See Roberson*, 486 U.S. at 682-83 (applying the "prophylactic *Edwards* rule" to a "police-initiated interrogation following a suspect's request for counsel . . . in the context of a separate investigation").

confession made after the suspect has requested the advice of counsel will be suppressed, even if there is no finding that the confession was involuntary.[40] Years may elapse, and if the assistance of counsel has been invoked once, law enforcement may never have a chance to question that person again, unless the suspect arranges for counsel to be present.[41] Suspects, knowing that they can speak with impunity if counsel is not present, have little incentive to arrange for the presence of counsel. Moreover, when more than one law enforcement agency is investigating the same person, there is the risk that one agency may not know that the suspect has invoked the assistance of counsel during previous questioning by another agency.[42] The unsuspecting officer may then elicit a confession that will later be suppressed, despite the fact that it was completely

---

[40] The FBI agrees that this is a significant problem for its agents. *See* FBI Memorandum, *supra* note 17, at 1-2.

[41] An extreme example of this application of *Miranda*'s exclusionary rule occurred in *United States v. Green*, 592 A.2d 985 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed as moot*, 507 U.S. 545 (1993). There, a suspect invoked his right to counsel during questioning by federal law enforcement about possession of a controlled substance. He eventually pled guilty and was incarcerated. Over five months after invoking his right to counsel, and while in prison, local law enforcement obtained an arrest warrant for the suspect, charging him with involvement in a robbery and murder that were unrelated to his conviction for drug possession. After being read his *Miranda* rights by local law enforcement and having waived the assistance of counsel, he confessed to his involvement in the robbery and murder. At trial, his confession was suppressed because he had asked for a lawyer in connection with the initial drug charge. *See id.* at 985-87 (relying on *Minnick*). The D.C. Court of Appeals affirmed. *See id.* at 991 (applying *Edwards*, *Roberson*, and *Minnick*, and stating that if there is a limiting aspect to these cases that would allow questioning in this circumstance, it is up to this Court to identify that "red thread").

[42] *See Roberson*, 486 U.S. at 678 (suspect was questioned a second time by an officer who "was not aware of the fact that [the suspect] had requested the assistance of counsel three days earlier").

voluntary.[43] Even a waiver at the beginning of the second round of questioning cannot undo the suspect's earlier invocation of his rights.[44]

Our society pays a high price for the suppression of confessions based on such "technicalities," namely the release of confessed criminals. While society expects the constitutional rights of suspects to be protected,[45] society also expects that the justice system will not allow confessed criminals, whose constitutional rights have been respected, to go unpunished based on "technicalities."[46]

---

[43] *See* FBI Memorandum, *supra* note 17, at 2 ("[T]he protections [outlined in these cases] complicate the right to counsel rule since it is often difficult for law enforcement officers to discern and comply with those protections. As a result, completely voluntary statements may get suppressed because of technical violations of *Miranda* and its progeny.").

[44] *See Green*, 592 A.2d at 986 (after being given *Miranda* warnings before second round of questioning, suspect waived the assistance of counsel). The Court's cases in the area of requests for assistance of counsel stand in sharp contrast to its cases dealing with a suspect who invokes the right to remain silent. In the latter situation, officers must "'scrupulously honor[]'" such a request, but are permitted to question a suspect again about a different criminal matter as long as a sufficient period of time has passed after the first round of questioning ceased (a matter of hours may be permissible) and *Miranda* warnings are given again when questioning resumes. *See Michigan v. Mosley*, 423 U.S. 96, 102-06 (1975) (no passage in *Miranda* "can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent").

[45] *See* Petitioner's Brief at 44-45; Brief of United States at 49; Bell Brief at 24-25.

[46] The Court has recognized the need to consider society's interests in an effective law enforcement policy that prevents criminals from being released based on such "technicalities":

> [W]e also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." These interests

B. Section 3501 Will Prevent Voluntary Confessions from Being Suppressed.

The virtue of section 3501 is that it remedies the excesses of *Miranda*'s exclusionary rule, while still providing incentives for law enforcement to adhere to *Miranda*'s procedural safeguards.[47] Section 3501 does not completely eliminate *Miranda*'s exclusionary rule.[48] Rather section 3501 simply tempers the rule to exclude confessions only when the Fifth Amendment has in fact been violated, rather than employing an irrebuttable presumption that every time the procedural safeguards are not followed, an ensuing confession is involuntary.[49] Under section 3501, oversights and harmless mistakes by law enforcement will no longer be grounds for throwing out voluntary confessions.

Placing the trigger for section 3501's exclusionary rule on the finding of a constitutional violation also brings it into harmony with the application of the exclusionary rule in other criminal procedure contexts. For example, the fruits of an illegal search are generally only excluded when the court finds that "evidence [has been] obtained in violation of the Fourth Amendment." *Illinois v. Krull*, 480 U.S. 340, 347 (1987).[50] The same is true with regard to the right to counsel,

---

may be outweighed by the need to provide an effective sanction to a constitutional right, but they must in any event be valued.

Tucker, 417 U.S. at 450-51 (citations omitted).

47 *See supra* Parts I and II.

48 *See* 18 U.S.C. § 3501(a) (confessions are only admissible if "voluntarily given").

49 *Compare id. with Miranda*, 384 U.S. at 444 ("[T]he prosecution may not use [confessions] . . . unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

50 *Cf.* LaFave & Israel, *supra* note 15, § 3.1(e), at 114 (evidence may also be suppressed if a federal or state statute or administrative regulation

where the trigger for excluding evidence is an actual violation of the Sixth Amendment. *See, e.g., United States v. Bierey*, 588 F.2d 620, 623 (8th Cir. 1978) ("[O]nce it is shown that the lineup was conducted in violation of an accused's sixth amendment right to counsel, all evidence of the pretrial confrontation and of the subsequent in-court identification by the witness is to be excluded . . . ."). In contrast, under the *Miranda* exclusionary rule, the trigger for the suppression of evidence is the violation of a prophylactic safeguard. *See Elstad*, 470 U.S. at 307.

Section 3501 also creates consistency among the various applications of the exclusionary rule in the Fifth Amendment context. The Court has held that "in situations that fall outside the sweep of the *Miranda* presumption," *Elstad*, 470 U.S. at 307, such as when prosecutors seek to introduce evidence that was discovered as a result of a confession given without *Miranda* warnings, *see, e.g., Tucker*, 417 U.S. at 435, 448-50, "'the primary criterion of admissibility [remains] the "old" due process voluntariness test,'" *Elstad*, 470 U.S. at 307-08 (quoting Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 877 (1981)) (alterations in original). Section 3501 creates a single test to deal with all confessions and the fruits therefrom – *i.e.*, whether there was a violation of the Fifth Amendment prohibition against involuntary self-incrimination.

In short, section 3501 reins in the exclusionary rule to reach only those confessions elicited in violation of the suspect's Fifth Amendment rights.

---

has been violated, but even then the exclusionary rule does not "inevitably follow").

CONCLUSION

For the foregoing reasons, the Court should affirm the Fourth Circuit's decision that 18 U.S.C. § 3501 governs the admission of voluntary confessions in federal criminal cases.

Respectfully submitted,

Of Counsel
LYLE ROBERTS
1806 W. Abingdon Dr.
Apt. 202
Alexandria, VA 22314

ROBERT F. HOYT
Counsel of Record
KARAN BHATIA
HESTER PEIRCE
CHRISTOPHER SIMKINS
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for Amicus Curiae

March 9, 2000

Mar 9 2000 (31)

Supreme Court, U.S.
FILED
MAR 09 2000
CLERK

No. 99-5525

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF SENATORS ORRIN G. HATCH, TRENT LOTT, DON NICKLES, STROM THURMOND, BOB SMITH, LARRY E. CRAIG, PAUL COVERDELL, FRED THOMPSON, JON KYL AND JEFF SESSIONS URGING AFFIRMANCE

SENATOR ORRIN G. HATCH
Counsel of Record

United States Senate
Washington, D.C. 20510
(202) 224-5225

Attorney for Amici Curiae

BEST AVAILABLE COPY

34AP

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. SECTION 3501 GOVERNS THE ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURT 6

A. The *Miranda* Rules Are Not Mandated by the Constitution 6

B. In Enacting § 3501, Congress Determined That Unwarned Custodial Interrogations Do Not Necessarily Produce Compelled Confessions 10

C. Section 3501 Reaffirms *Miranda*'s Basic Holding That Suspects in Custody Should Be Advised of Their Constitutional Rights 14

II. IF THIS COURT ACCEPTS THE ARGUMENTS ADVANCED BY PETITIONER AND RESPONDENT, THEN CONGRESS' AUTHORITY TO ESTABLISH RULES OF PROCEDURE AND EVIDENCE FOR FEDERAL COURTS WILL BE DIMINISHED 17

III. SECTION 3501 IS CONSTITUTIONAL 19

A. The Statute Does Not Lessen the Constitutional Protections Afforded to Suspects in Custody 20

B. Congress' Determination That § 3501 Is Constitutional Is Entitled to Deference ... 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995) 25

Anders v. California, 386 U.S. 738 (1967) 9

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 19

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 18, 24

Carlisle v. United States, 517 U.S. 416 (1996) 18

City of Boerne v. Flores, 521 U.S. 507 (1997) 24, 25

Coleman v. Thompson, 501 U.S. 722 (1991) 8, 13

Colorado v. Spring, 479 U.S. 564 (1987) 16

Connecticut v. Barrett, 479 U.S. 523 (1987) 8

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 8

Davis v. United States, 512 U.S. 452 (1994) 3, 4, 8

Duckworth v. Eagan, 492 U.S. 195 (1989) 8

Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 25

Funk v. United States, 290 U.S. 371 (1933) 18

Gordon v. United States, 344 U.S. 414 (1953) 18

Harris v. New York, 401 U.S. 222 (1971) 7

Haynes v. Washington, 373 U.S. 503 (1963) 10

INS v. Chadha, 462 U.S. 919 (1983) 4

Jackson v. Denno, 378 U.S. 368 (1964) 16

Katzenbach v. Morgan, 384 U.S. 641 (1966) 13, 14, 20, 21, 25, 27

Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 25, 26

Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) 13, 25

Lynumn v. Illinois, 372 U.S. 528 (1963) 10

Mallory v. United States, 354 U.S. 449 (1957) 18

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 24

McNabb v. United States, 318 U.S. 332 (1943) 18

Michigan v. Tucker, 417 U.S. 433 (1974) 7

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Monnell v. Department of Soc. Servs.,
436 U.S. 658 (1989) 22

Monroe v. Pope, 365 U.S. 168 (1961) 22

New York v. Quarles, 467 U.S. 649 (1984) 7

Nishikawa v. Dulles, 356 U.S. 129 (1958) 9

Oregon v. Elstad, 470 U.S. 298 (1985) 7, 21

Oregon v. Hass, 420 U.S. 714 (1975) 7

Palermo v. United States, 360 U.S. 343 (1959) 17, 19

Pennsylvania v. Finley, 481 U.S. 551 (1987) 9

Penson v. Ohio, 488 U.S. 75 (1988) 9

Sandstrom v. Montana, 442 U.S. 510 (1979) 21

Smith v. Robbins, 120 S. Ct. 746 (2000) 9, 24

Turner Broadcasting Sys., Inc. v. FCC,
520 U.S. 180 (1997) 12

United States v. Alvarez-Sanchez,
511 U.S. 350 (1994) 19

United States v. Christopher,
956 F.2d 536 (6th Cir.1991) 18

United States v. Crocker, 510 F.2d 1129
(10th Cir. 1975) 3

United States v. Dickerson, 166 F.2d 667
(4th Cir. 1999), *cert. granted in part by*
Dickerson v. United States, 120 S. Ct. 578
(1999) (No. 99-5525) 2

United States v. Hasting, 461 U.S. 499 (1983) 18

United States v. Lanier, 520 U.S. 259 (1997) 22

United States v. Lopez, 514 U.S. 549 (1995) 23

United States v. Pugh, 25 F.3d 669 (8th Cir. 1994) 18

United States v. Rivas-Lopez,
988 F. Supp. 1424 (D. Utah 1997) 3

United States v. Tapia-Mendoza,
41 F. Supp.2d 1250 (D. Utah 1999) 3

Vance v. Terrazas, 444 U.S. 252 (1980) 8, 17

Constitution and Statutes:

U.S. Const.:
Art. I, § 8, cl. 9 18
Art. II, § 3 4
Amend. V ..... *passim*

18 U.S.C. § 241 22

18 U.S.C. § 242 22

18 U.S.C. § 3501 ..... *passim*

28 U.S.C. § 2680 23

28 U.S.C. § 2671 ..... 22, 23

42 U.S.C. § 1983 22

Congressional Materials:

Confirmation of Deputy Attorney General Nominee Eric Holder: Hearing Before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. (1997) ... 2

Controlling Crime Through Effective Law Enforcement: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) ... 23

Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. 89-90 (1997) 2

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) ..... *passim*

Solicitor General Oversight: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) 2

The Administration of Justice and the Enforcement of Laws: Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) ... 2

The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions: Hearing Before the Senate Subcomm. on Crim. Justice Oversight of the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) 1

Miscellaneous:

Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. Pitt. L. Rev. 1007 (1988) 22

114 Cong. Rec. (1968):
pp. 11,200-07 24
pp. 11,228-30 24
pp. 11,234-35 24
pp. 11,593-97 24
pp. 11,611-13 24
pp. 11,740-47 24
pp. 11,891-907 24
pp. 12,457-75 24
pp. 12,477-81 24
pp. 12,798-822 24
pp. 12,829-36 24
pp. 13,202-03 24
pp. 13,652-56 24

pp. 13,845-67 24
pp. 13,989-14,084 24
pp. 14,129-59 24
pp. 14,162-84 24
pp. 16,066-298 24

Letter from Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, and Senator Strom Thurmond, Chairman of the Senate Subcommittee on Criminal Justice Oversight, to Janet Reno, United States Attorney General, and Seth P. Waxman, United States Solicitor General (Feb. 15, 2000) 3

Letter from Janet Reno, United States Attorney General, to Albert Gore, Jr., President of the United States Senate (Nov. 1, 1999) 1

Office of Legal Policy, *Report to the Attorney General on the Law of Pre-Trial Interrogation: Truth in Criminal Justice* (Feb. 12, 1986), *reprinted in* 22 U. Mich. J.L. Reform 437 (1989) 24

Michael Edmund O'Neill, *Undoing* Miranda, 2000 B.Y.U. L. Rev. 101 (forthcoming 2000) 12

Opinions of the Office of Legal Counsel (Apr. 6, 1981) ... 1

INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of Senators Orrin G. Hatch, Trent Lott, Don Nickles, Strom Thurmond, Bob Smith, Larry E. Craig, Paul Coverdell, Fred Thompson, Jon Kyl and Jeff Sessions (hereinafter "Amici"), urging affirmance of the judgment below. Amici contend that 18 U.S.C. § 3501 (hereinafter "§ 3501") represents a valid and constitutional exercise of Congress' legislative authority to establish the rules of procedure and evidence for federal courts. As members of the United States Senate, Amici further believe they will bring to the Court's attention relevant information the parties have not addressed.

Amici's interest in this case is significant because no formal representative of the federal government is arguing in support of § 3501's constitutionality. Historically, the Justice Department has defended the constitutionality of congressional acts unless it can make no "reasonable argument" in the Act's defense. *See* Letter from Janet Reno, United States Attorney General, to Albert Gore, Jr., President of the United States Senate 2 (Nov. 1, 1999) ("It has been, and continues to be, the traditional practice of the Department of Justice in virtually all cases to defend the constitutionality of an Act of Congress unless it is plainly unconstitutional."); *see also* 5 Opinions of the Office of Legal Counsel 25, 25-26 (Apr. 6, 1981) ("[T]he Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."). In addition, the Justice Department historically has supported the use of § 3501. *See The Clinton Justice Department's Refusal to Enforce the Law on Voluntary*

---

[1] Pursuant to Rule 37.6, this brief was authored and prepared in its entirety by Amici.

Confessions: Hearing Before the Senate Subcomm. on Crim. Justice Oversight of the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. 95-97 (1999) (discussing support for § 3501 by Nixon, Reagan and Bush administrations).

In congressional testimony before the Senate Judiciary Committee, Attorney General Janet Reno, Deputy Attorney General Eric Holder and former Solicitor General Drew Days each testified that the Justice Department had "no policy" against invoking § 3501 and, to the contrary, was prepared to use the statute "in an appropriate case." *Solicitor General Oversight: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (statement of then-Solicitor General Drew Days); *see also The Administration of Justice and the Enforcement of Laws: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 91 (1995) (written answer of Attorney General Janet Reno); *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearing before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 124 (1997) (written answer of Deputy Attorney General-designate Eric Holder). They testified that the Justice Department previously had declined to invoke § 3501, not because the Department believed the statute to be unconstitutional, but because of procedural problems in particular cases. *See, e.g., Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 89-90 (1997) (testimony of Attorney General Janet Reno).

Notwithstanding the foregoing, the Justice Department has decided not to defend the constitutionality of § 3501 in this case and instead has joined the petitioner in challenging the statute. This is so, notwithstanding the fact that "reasonable arguments" unquestionably can be made in the statute's defense. Courts that have squarely addressed the issue have determined that § 3501 is constitutional. *See, e.g., United States v. Dickerson*, 166 F.2d 667 (4th Cir. 1999) (holding that "§ 3501, rather than *Miranda*, governs the admissibility of

confessions in federal court"), *cert. granted in part by Dickerson v. United States*, 120 S. Ct. 578 (1999) (No. 99-5525); *United States v. Crocker*, 510 F.2d 1129, 1138 (10th Cir. 1975) (holding "that the trial court did not err in applying the guidelines of section 3501 in determining the issue of the voluntariness of Crocker's confession"); *United States v. Tapia-Mendoza*, 41 F. Supp.2d 1250, 1255 (D. Utah 1999) (holding that "[r]esponses by defendants in criminal cases to custodial and other questions are governed by a post-*Miranda* statute" (citing § 3501)); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1436 (D. Utah 1997) (applying § 3501 to determine voluntariness despite apparent *Miranda* violation due to continued questioning after defendant had invoked *Miranda* rights); *see also Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (stating that there "is no excuse" for the "United States' repeated refusal to invoke § 3501"). Moreover, the Justice Department has refused to defend the statute despite the fact "that at least one federal law enforcement agency, the Drug Enforcement Administration, (1) determined that the *Miranda* decision hinders its investigations and (2) requested that the Department of Justice defend the constitutionality of 18 U.S.C. § 3501 before the Supreme Court." Letter from Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, and Senator Strom Thurmond, Chairman of the Senate Subcommittee on Criminal Justice Oversight, to Janet Reno, United States Attorney General, and Seth P. Waxman, United States Solicitor General (Feb. 15, 2000).[2]

---

[2] In response to the letter sent by Senators Hatch and Thurmond on February 15, 2000, respondent lodged with the Court, *inter alia*, two memoranda of the Drug Enforcement Administration ("DEA"). In substance, the memoranda assert that "the automatic exclusion from evidence of all statements that do not comply with the *Miranda* rule is harmful to the administration of justice," Memorandum from Robert C. Gleason, Deputy Chief Counsel, DEA,

In the view of Amici, the Justice Department's failure to invoke § 3501 in appropriate cases, as well as its refusal to defend the statute's constitutionality in this case, is not "consistent with the Executive's obligation to 'take Care that the Laws be faithfully executed.'" *Davis*, 512 U.S. at 465 (Scalia, J., concurring) (quoting U.S. Const. art. II, § 3). In cases where the Executive Branch declines to defend an Act of Congress, this Court has routinely accepted briefing from Members of Congress. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983). Given this case's importance and the deference owed congressional judgments by the Executive and Judicial Branches, Amici respectfully submit this brief as *amici curiae* and urge this Court to affirm the judgment below.[3]

---

to Patty Stemler, Chief, Criminal Division, Appellate Section 1 (undated); and that "Section 3501 provides greater flexibility to the law enforcement officer in obtaining voluntary statements," Memorandum from Richard A. Fiano, Chief of Operations, DEA, to Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Policy Development 2 (Oct. 13, 1999). In an effort to explain away these memoranda, respondent has lodged with the Court a third, recently-authored DEA memorandum which attempts "to clarify" DEA's earlier memoranda. *See* Memorandum from Cynthia R. Ryan, Chief Counsel, DEA, to Seth P. Waxman, Solicitor General 1 (Feb. 22, 2000). Although this third memorandum claims that DEA "did not intend" in its prior memoranda to depart from the "basic belief" that "complying with the *Miranda* decision generally does not hinder DEA investigations," it concedes that DEA prefers "the flexibility that 18 U.S.C. § 3501 could provide." *Id.* at 2. Thus, it seems apparent, contrary to the impression made by respondent's brief, that federal law enforcement agencies are mixed on whether the legal rules of § 3501, as opposed to those of *Miranda*, are preferable to law enforcement and should be defended by the Justice Department before this Court.

[3] This brief is filed with the consent of the parties pursuant to Rule 37.3(a). Letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

Section 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. The *Miranda* rules are not mandated by the Constitution. The *Miranda* decision itself does not purport to be a constitutional ruling, and this Court, in numerous cases, has repeatedly referred to the *Miranda* rules as prophylactic safeguards that are non-constitutional in nature.

In enacting § 3501, Congress determined that unwarned custodial confessions are not necessarily coercive, thereby undermining the central factual assumption upon which the *Miranda* decision was based. Congress' determination in this respect was based on considerable deliberation and debate. Section 3501 supersedes *Miranda*'s conclusive presumption that unwarned custodial confessions necessarily are the product of coercion and therefore are inadmissible. The statute, however, reaffirms *Miranda*'s basic holding that suspects in custody should be advised of their constitutional rights.

If this court accepts the arguments advanced by petitioner and respondent, then Congress' authority to establish rules of procedure and evidence for federal courts will be diminished. Although this Court may devise non-constitutional rules of procedure and evidence for federal courts, it may only do so in the absence of a statute. If the non-constitutional *Miranda* rules are upheld in this case, then this Court effectively will have plenary power to devise both constitutional and non-constitutional rules for federal courts.

Finally, § 3501 is constitutional. The statute does not lessen the constitutional protections afforded to suspects in custody. Instead it merely alters the non-constitutional prophylactic safeguards this Court devised in *Miranda*. Congress determined that § 3501 was constitutional when it enacted the statute and that determination is entitled to deference.

ARGUMENT

I. SECTION 3501 GOVERNS THE ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURT.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court first prescribed a rule of procedure: police shall provide suspects in custody with four specified warnings, *see id.* at 444; and then set forth a rule of evidence: any statement stemming from the custodial interrogation of a suspect is conclusively presumed to be involuntary, and therefore inadmissible, unless the warnings first were given (or waived), *see id.* In *Miranda*, however, this Court made clear that *Miranda*'s warnings and its conclusive presumption that unwarned custodial confessions are always coercive, are not constitutionally mandated. Thus, this Court invited Congress to create its own procedures to safeguard the privilege against compelled self-incrimination.

Congress acted on the Court's invitation and, following hearings and extensive floor debate, found that the facts upon which *Miranda*'s conclusive presumption is based are incorrect. Congress determined that an unwarned custodial confession is not necessarily the product of coercion and therefore does not have to be excluded from trial *per se*. Accordingly, acting pursuant to its legislative authority to establish rules of procedure and evidence for the federal courts, Congress enacted § 3501. In so doing, Congress codified the familiar *Miranda* warnings, but superseded *Miranda*'s conclusive presumption that unwarned custodial interrogations necessarily produce involuntary, and hence inadmissible, confessions.

A. The *Miranda* Rules Are Not Mandated by the Constitution.

The *Miranda* Court made the factual assumption that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. Based upon this factual assumption, the Court held that any statement resulting from the custodial interrogation of a suspect would be *conclusively presumed* to be involuntary, and therefore inadmissible, unless express warnings first had been given (or waived). *See id.* at 479. Thus, the Court devised an "anticipatory remedy" for potential constitutional violations that might occur.

Since *Miranda*, however, this Court has held in numerous cases that an unwarned custodial confession is not tantamount to a Fifth Amendment violation and, therefore, does not have to be excluded from evidence on a *per se* basis. Stated differently, this Court effectively has come to reject *Miranda*'s conclusive presumption that unwarned custodial interrogations necessarily produce coerced confessions. As a result, this Court has admitted confessions into evidence, even though the suspect was in custody and *Miranda* warnings were not given. *See, e.g., New York v. Quarles*, 467 U.S. 649, 657 (1984) (recognizing a "public safety" exception to *Miranda*'s "prophylactic rule"); *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975) (admitting unwarned statements to impeach testifying defendant at trial); *Michigan v. Tucker*, 417 U.S. 433, 445-47 (1974) (holding that the failure to apply *Miranda*'s interrogation safeguards is not *per se* a constitutional violation and that a statement will not invariably be deemed "compelled" in violation of the Fifth Amendment simply because it was unwarned); *Harris v. New York*, 401 U.S. 222, 224 (1971) (admitting unwarned statements for impeachment); *see also Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (declining to suppress fruits of an unwarned confession). Indeed, this Court frequently has observed that the *Miranda* rules are "prophylactic" in character and that an unwarned statement is not necessarily "compelled" in violation of the Fifth Amendment. *See,*

e.g., *Davis*, 512 U.S. at 457; *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). These cases establish that statements resulting from an unwarned custodial interrogation do not necessarily have to be excluded from evidence – *i.e.*, they show that the conclusive presumption of *Miranda* is unsupportable.[4]

Conclusive presumptions, like the one set forth in *Miranda*, are "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). The *Miranda* Court noted that pursuant to the conclusive presumption it established, "we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 384 U.S. at 468. Such presumptions "require the Court to make broad generalizations. . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). Accordingly, conclusive presumptions are based upon judicial convenience, not on the Constitution.

At no point did the *Miranda* Court state that the conclusive presumption it set forth was constitutionally required. The *Miranda* Court acknowledged that the Constitution did not command this safeguard, *see Miranda*, 384 U.S. at 467; disclaimed any intent to create a "constitutional straightjacket," *id.*; referred to the warnings and the conclusive

---

[4] Respondent admits as much. *See* Brief for the United States at 40, *Dickerson v. United States*, No. 99-5525 (filed Jan. 28, 2000) ("The Court's decisions in *Tucker* and later cases rest on the conclusion that . . . a violation of *Miranda*'s prophylactic rules does not necessarily produce statements that are themselves 'compelled.'").

presumption as "procedural safeguards," *id.* at 444; and specifically invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Moreover, the *Miranda* Court specifically recognized that the Constitution requires no "particular solution" for the regulation of police interrogations. *Id.* at 467. Thus, *Miranda*, by its own terms, did not purport to establish as a constitutional rule the conclusive presumption that a confession obtained without the warnings is involuntary. *Cf. Vance v. Terrazas*, 444 U.S. 252, 266 (1980) (noting that rule set forth in *Nishikawa v. Dulles*, 356 U.S. 129 (1958), was non-constitutional in part because *Nishikawa* itself "did not purport to be a constitutional ruling").

Recently, this Court held in *Smith v. Robbins*, 120 S. Ct. 746 (2000), that the judicially-created *Anders* rule concerning the acceptable procedure for handling frivolous appeals of indigent criminal defendants, *see Anders v. California*, 386 U.S. 738 (1967), was not mandated by the Constitution. The *Anders* rule had been referred to by this Court in cases subsequent to *Anders* as a "prophylactic framework," *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and a "safeguard" for protecting a defendant's right to appellate counsel, *Penson v. Ohio*, 488 U.S. 75, 80 (1988). Similarly, the judicially-created rules set forth in *Miranda*, which this Court repeatedly has referred to as being "prophylactic" and "procedural safeguards" protecting the constitutional right against self-incrimination, are not mandated by the Constitution. *Compare Smith*, 120 S. Ct. at 757 (stating that if the *Anders* rule was mandated by the Constitution, then a "straitjacket" would be placed upon the States' efforts "to experiment with solutions to difficult problems of policy"), *with Miranda*, 384 U.S. at 467 (disclaiming any intention to create a "constitutional straitjacket which will handicap sound efforts at reform"). In sum, this Court, both in *Miranda* and in subsequent cases, has held that the procedural and evidentiary rules set forth in *Miranda* are rules of judicial convenience, not rules required by the Constitution.

B. In Enacting § 3501, Congress Determined That Unwarned Custodial Interrogations Do Not Necessarily Produce Compelled Confessions.

The conclusive presumption set forth in *Miranda* – that unwarned custodial confessions necessarily are the product of coercion and therefore are inadmissible – is based upon a factual assumption that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures." 384 U.S. at 467. As support for this factual assumption,[5] the *Miranda* Court surveyed certain police manuals to obtain a general picture of police interrogation practices, reviewed the "Wickersham Report" detailing police misconduct in the 1930s, and gleaned anecdotal evidence of police brutality from individual cases. *See id.* at 445-47.

Congress, however, determined that *Miranda*'s factual predicate for establishing the warnings and conclusive presumption was erroneous. Congress concluded that an unwarned custodial confession is not necessarily the product of coercion; as a result, Congress found that an unwarned confession did not necessarily need to be excluded from evidence. *See* 18 U.S.C. § 3501(b); *see also* S. Rep. No. 1097, 90th

[5] Whether a suspect (or a class of future suspects) was coerced into confessing necessarily is a factual question. *See Haynes v. Washington*, 373 U.S. 503, 515 (1963) (discussing factual inquiry into "the effect of psychologically coercive pressures and inducements on the mind and will of an accused"); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (noting that the "question in each case is whether the defendant's will was overborne at the time he confessed"); *see also* S. Rep. No. 1097, 90th Cong., 2d Sess. 58 (1968) (noting that "whether *in fact* a confession has been voluntarily made" is an "essential *fact* issue[]" (emphasis in original)).

Cong., 2d Sess. 60 (1968) (asking rhetorically "if, *in fact*, custodial interrogation is not inherently coercive, how does the constitutional basis of the decision fare?"). In considering the legislation that became § 3501, Congress determined that *Miranda*'s factual assumption was not supported by the evidence.[6] In *Miranda*,

> the Court made a finding of fact that every custodial interrogation was inherently coercive and intimidating. And upon what basis is this conclusion drawn? It is . . . not by examination of the records of any police interrogation, not by drawing upon a developing consensus among the authorities in this area. . . . Rather, the Court notes that since "[i]nterrogation still takes place in privacy," there is a secrecy which "results in a gap in our knowledge as to what *in fact* goes on in the interrogation rooms."

S. Rep. No. 1097, 90th Cong., 2d Sess. 55 (1968) (quoting *Miranda*, 384 U.S. at 448); *see also id.* (noting that the "data supporting the [Court's] conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed"); *see also*

[6] The dissenting Justices make this abundantly clear. *See Miranda*, 384 U.S. at 499-500 (Clark, J., dissenting) (noting that "the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports"); *id.* at 515-26 (Harlan, J., dissenting) (noting that the majority "portrays the evils of normal police questioning in terms which I think are exaggerated"); *id.* at 536 (White, J., dissenting) (noting that "for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts").

id. at 48 (finding in 1968 that "while coercive practices might have been approved 30 years ago, they have no place in modern police techniques" and that "the Court overreacted to defense claims that police brutality is widespread"). Congress' conclusion that *Miranda*'s factual assumption was empirically wrong was based upon data collected from a broad range of sources and was the product of considerable deliberation and debate. *See generally* S. Rep. No. 1097, *supra*; Michael Edmund O'Neill, *Undoing* Miranda, 2000 B.Y.U. L. Rev. 101 (forthcoming 2000).

Unlike the Supreme Court, Congress is not bound by the parties' submissions, but instead can conduct hearings, canvass constituents and obtain information from a broad range of sources. With respect to gathering facts relating to custodial interrogations, "Congress, with its vastly superior fact-gathering powers, is in a much better position than the Court to formulate standards most likely to result in a correct determination, in a given case, of the issue of voluntariness of a confession." S. Rep. No. 1097, *supra* at 47 (statement of then-California Attorney General Thomas C. Lynch); *see also Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (noting that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions"); *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting) (noting that "legislative reforms . . . have the vast advantage of empirical data and comprehensive study . . . [and] allow experimentation and use of solutions not open to the courts"). The *Miranda* Court seemed to have recognized its own inherent institutional limitations, as it specifically invited Congress and State legislatures "to develop their own safeguards for [protecting] the privilege" against self-incrimination. *Id.* at 490.

Congress was justified in superseding *Miranda*'s conclusive presumption when it enacted § 3501. This Court has held that conclusive presumptions "should not be applied

. . . in situations where the generalization is incorrect as an empirical matter." *Coleman*, 501 U.S. at 737. In fact, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* Here, according to congressional findings, the basis for *Miranda*'s conclusive presumption is incorrect as an empirical matter and the presumption does not reach the correct result – *i.e.*, suppressing only coerced confessions – most of the time that it is applied.

It is well established that Congress may, in enacting legislation, substitute its own factual determinations for those of the Supreme Court. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), for example, this Court upheld § 4(e) of Voting Rights Act of 1965, which prohibited States from using English literacy tests to prevent certain non-English speaking minorities from voting. *See id.* at 653. Prior to the enactment of § 4(e), this Court had made the factual determination that a North Carolina statute that established English literacy as a voting prerequisite did not violate the Fourteenth Amendment's Equal Protection Clause. *See Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959). Congress, however, disagreed with the Court's factual determination in *Lassiter* and decided that the North Carolina law did, in fact, violate the Equal Protection Clause. To remedy that violation, Congress enacted § 4(e) of the Voting Rights Act of 1965. Opponents challenged the constitutionality of § 4(e), arguing that Congress could not act under its Fourteenth Amendment remedial authority unless the Court first determined that a constitutional violation had occurred. In the absence of such a violation, it was claimed, Congress had no authority to act.

In *Katzenbach*, the Court rejected that limited vision of Congress' authority. The Court instead determined that Congress had sufficient factual evidence before it to support a reasonable conclusion that § 4(e) was necessary to prevent a denial of equal protection. *See* 384 U.S. at 653. Congress

simply made its own appraisal of the facts and reached a different factual conclusion than the Court; in turn, the Court deferred to Congress' judgment. *See id.* ("It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

Under the reasoning of *Katzenbach*, although Congress may not legislatively require the admission of an involuntary confession in violation of the Fifth Amendment, it may rely on its "specially informed legislative competence," *id.* at 656, to make its own appraisal of the facts when enacting legislation in its "search for increasingly effective ways of protecting the individual while promoting efficient enforcement of our criminal laws," *Miranda*, 384 U.S. at 467. Indeed,

> because *Miranda* . . . was based upon a factual conclusion by the Justices, and [because] . . . Congress may undertake to mold constitutional policy by itself making factual determinations, it is proper and appropriate for Congress, by simple legislation, not to override *Miranda*, but to present to the Court a factual determination and conclusion different from that underpinning *Miranda*.

S. Rep. No. 1097, *supra*, at 63.

C. Section 3501 Reaffirms *Miranda*'s Basic Holding That Suspects in Custody Should Be Advised of Their Constitutional Rights.

Section 3501 provides that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). In determining the issue of voluntariness, the statute provides that the trial judge shall

> take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Id. at § 3501(b). Additionally, the statute provides that "[t]he presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." *Id.*

Section 3501 was a progressive expansion of suspects' rights as compared to pre-*Miranda* law. First, the text of § 3501 reveals that Congress codified the familiar *Miranda* warnings,[7] which were not mandated prior to the *Miranda*

---

[7] *Compare id.* at § 3501(b)(3)-(4) (trial court to determine "whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him" and "whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel"), *with Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person [in custody] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

decision, and specifically directed the trial court to consider whether the warnings were given. Congress thus took into account the testimony of congressional hearing witnesses who indicated that warnings of some sort were needed.

In several additional respects, Congress went well beyond pre-*Miranda* law when it enacted § 3501. The statute codified the requirement set forth by this Court in *Jackson v. Denno*, 378 U.S. 368 (1964), that while the judge shall admit voluntary confessions, he also "shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." 18 U.S.C. § 3501(a). Such an instruction permits the defendant to place the confession within its proper context and seek mitigation from the jury. The statute also requires the judge to consider whether the "defendant knew of the nature of the offense with which he was charged or of which he was suspected at the time of the confession." *Id.* at § 3501(b)(2). This requirement not only surpasses pre-*Miranda* law, but also current law, which holds that the failure of police to inform a suspect "of the subject matter of the interrogation could not affect [his] decision to waive his Fifth Amendment privilege in a constitutionally significant manner." *Colorado v. Spring*, 479 U.S. 564, 577 (1987). Section 3501 also is considerably broader than pre-*Miranda* law in recognizing a statutory right to counsel and making relevant whether a suspect "was without the assistance of counsel when questioned and when giving such confession." 18 U.S.C. § 3501(b)(5). Prior to *Miranda*, no general right to assistance of counsel during police interrogation existed.

Section 3501's declaration that the "presence or absence" of the warnings "*need not be conclusive* on the issue of the voluntariness of the confession," 18 U.S.C. § 3501(b) (emphasis added), makes clear that Congress rejected *Miranda*'s conclusive presumption that all unwarned confessions necessarily are compelled and therefore are inadmissible at trial. This Court, however, is free to read the statute as

requiring courts to give strong consideration to the absence of warnings as a factor suggesting a confession was given involuntarily. In summary, the text of § 3501 reveals that Congress engaged in a reasoned legislative approach to craft procedural requirements that balance the need for efficient law enforcement against the protection of suspects' constitutional rights.

II. IF THIS COURT ACCEPTS THE ARGUMENTS ADVANCED BY PETITIONER AND RESPONDENT, THEN CONGRESS' AUTHORITY TO ESTABLISH RULES OF PROCEDURE AND EVIDENCE FOR FEDERAL COURTS WILL BE DIMINISHED.

The authority of Congress to establish rules of procedure and evidence for federal courts will be seriously diminished if this Court accepts the arguments advanced by petitioner and respondent. This Court repeatedly has held that Congress enjoys the power to supersede by legislation judicially-created rules of procedure and evidence that are not constitutionally required. *See, e.g., Vance*, 444 U.S. at 265 (upholding statute altering judicially-created evidentiary standard for expatriation proceedings because "the Constitution" did not require prior standard); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959) (upholding federal statute establishing narrower criteria for disclosing *Jenks* material than prior non-constitutional rule established by Supreme Court).[8] "This power, rooted in the

---

[8] Amici do not dispute that, in the "absence of statutory provision," the Supreme Court has inherent supervisory power "to prescribe procedures for the administration of justice in the federal courts." *Palermo v. United States*, 360 U.S. 343, 345 (1959). Indeed, federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."

authority of Congress conferred by Art. I, § 8, cl. 9, of the Constitution to create inferior federal courts, is undoubted and has been frequently noted and sustained." *Vance*, 444 U.S. at 265-66 (citing cases). Accordingly, if a judicially-created rule is not required by the Constitution, then Congress may exercise its "congressional judgment," *see id.* at 266, and enact a statute that supersedes the non-constitutional rule.[9]

This Court's inherent, supervisory power over lower federal courts does not include the power to prescribe rules that circumvent or conflict with federal statutes. *See, e.g., Carlisle v. United States*, 517 U.S. 416, 425-26 (1996) (recognizing inherent power of federal courts to develop rules of criminal procedure unless the rules "circumvent or conflict with the

---

United States v. Hasting, 461 U.S. 499, 505 (1983). The power of the Supreme Court to prescribe non-constitutional rules of procedure and evidence for the federal courts, however, "exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11 (citing *Funk v. United States*, 290 U.S. 371, 382 (1933), and *Gordon v. United States*, 344 U.S. 414, 418 (1953)).

[9] For example, although this Court has yet to consider the issue, federal courts have found that the very statute at issue in this case – § 3501 – superseded the non-constitutional rule regarding the admissibility of confessions obtained during an unreasonable delay between a defendant's arrest and initial appearance set forth by this Court in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). *See United States v. Pugh*, 25 F.3d 669, 675 (8th Cir. 1994) (holding that § 3501 supersedes the *McNabb/Mallory* rule); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir.1991) (noting that § 3501, rather than *McNabb/Mallory*, governs the admissibility of confessions in federal court). Because the rule set forth in *McNabb* and *Mallory* is not required by the Constitution, the Eighth and Sixth Circuits concluded that Congress possessed the legislative authority to overrule both cases. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39.

Federal Rules of Civil Procedure"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (federal courts have no authority "to disregard constitutional or statutory provisions"). Accordingly, if Congress decides "to exercise its power to define the rules that should govern . . . instead of leaving the matter to the lawmaking of the courts," *Palermo*, 360 U.S. at 348, then such congressional rules or statutes – not judicially-created rules – must prevail, *see id.*

Congress exercised its power to define the rules that should govern the admissibility of confessions in federal court when it enacted § 3501. Accordingly, § 3501 is "the statute governing the admissibility of confessions in federal prosecutions." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994). Petitioner and respondent, however, contend that the extra-constitutional, judicially-created rules this Court set forth in *Miranda* should govern the admissibility of confessions in federal court. The procedural and evidentiary rules devised by the *Miranda* Court, however, are not mandated by the Constitution. *See* Section I.A., *supra*. If this Court accepts the arguments made by petitioner and respondent, then this Court will be empowered to exercise its supervisory authority to establish both constitutional and non-constitutional rules of procedure and evidence for the federal courts – and the legislative authority of Congress will be seriously diminished. Congress' authority to establish non-constitutional rules for the federal courts, and this Court's authority to devise such rules only in the "absence of statutory provision," *Palermo*, 360 U.S. at 345, should be upheld.

III. SECTION 3501 IS CONSTITUTIONAL.

Section 3501 is constitutional because it is "fully as effective," *Miranda*, 384 U.S. at 490, as the rules of procedure and evidence set forth in *Miranda* in safeguarding a suspect's constitutional rights while at the same time balancing society's

legitimate interest in law enforcement. The statute codified the *Miranda* warnings, so law enforcement officers have every incentive to continue to advise suspects in custody of their constitutional rights. The statute also sets forth other factors not contemplated by *Miranda* that district courts are to consider in assessing whether the suspect was compelled to confess. In addition, civil and criminal remedies that did not exist when *Miranda* was decided provide remedies for suspects whose constitutional rights have been violated. Importantly, Congress, a co-equal branch of government, determined, after thoroughly considering the issue and after substantial debate, that the statute comports fully with the requirements of the Constitution. Congress' judgment in this regard is entitled to deference.

A. The Statute Does Not Lessen the Constitutional Protections Afforded to Suspects in Custody.

In *Miranda*, this Court stated that "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as [the four warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 U.S. at 490. Congress' decision to supersede the conclusive presumption created by *Miranda* does not "restrict, abrogate, or dilute," *Katzenbach*, 384 U.S. at 651 n.10, the protections afforded to suspects in custody by the Fifth Amendment, *cf. id.* (holding that although Congress may enact legislation to "enforce" the Equal Protection Clause that is more protective than the Equal Protection Clause itself, Congress has no power to enact legislation that would violate the Equal Protection Clause). Section 3501 does not lessen the protections afforded by the Fifth Amendment because it expressly states that only confessions that are "voluntarily given" are admissible in evidence.

See 18 U.S.C. § 3501(a). Indeed, this Court has recognized that *Miranda*'s conclusive presumption goes beyond what is required by the Constitution to protect the privilege. That is why, under *Miranda*, even "patently voluntary statements . . . must be excluded" in some cases. *Elstad*, 470 U.S. at 307. In enacting § 3501, Congress simply recognized the need to offset the harmful effects created by *Miranda*'s conclusive presumption. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases).

Furthermore, Congress' decision to supersede *Miranda*'s conclusive presumption did not lessen the non-constitutional, prophylactic safeguards that protect the Fifth Amendment privilege against compelled self-incrimination. To the contrary, the "congressional remedies" adopted in § 3501 "constitute means which are not prohibited by, but are consistent 'with the letter and spirit of the constitution.'" *Katzenbach*, 384 U.S. at 656. When enacting § 3501, Congress agreed that the four warnings set forth in *Miranda* are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Accordingly, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C. § 3501(b)(3)-(4). Congress also believed that the suspect's knowledge regarding the offense for which he is being charged or investigated would be an important indicator of whether the suspect was compelled to make a statement, or confessed voluntarily. As a result, § 3501 instructs the trial judge to consider, in assessing voluntariness, whether the defendant "knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." *Id.* at § 3501(b)(2). The *Miranda* decision includes no such prophylactic safeguard.

Section 3501 also provides that the trial judge shall "take into consideration all the circumstances surrounding the

giving of the confession," *id.* at 3501(b), requiring trial courts to hold meaningful suppression hearings to assess whether, in fact, the suspect was compelled to confess in violation of the Constitution. This procedural safeguard – a full-blown suppression hearing – requires trial courts to consider whether, in fact, the suspect confessed voluntarily, not just whether the suspect received the warnings or waived his *Miranda* rights. *See* Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. Pitt. L. Rev. 1007, 1010 (1988) ("If *Miranda*'s prerequisites are followed, any resulting statement is virtually certain to be admissible at trial").

In addition to § 3501's safeguards, expanded criminal and civil penalties that were not in existence when *Miranda* was decided now operate to deter abusive police conduct and provide a remedy for individuals whose Fifth Amendment right against self-incrimination has been violated. Federal civil rights statutes prohibit conspiracies that violate constitutional rights. *See* 42 U.S.C. § 1983; 18 U.S.C. §§ 241, 242. This Court recently held that "[b]eating to obtain a confession plainly violates" 18 U.S.C. § 242. *United States v. Lanier*, 520 U.S. 259, 271 (1997). Individuals may sue government officials directly for constitutional injuries suffered. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).[10] And, Congress waived federal immunity from claims for deprivation of constitutional rights under the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 2671. Specifically, individuals may sue under the FTCA for claims arising "out of assault, battery, false imprisonment, false arrest, abuse of

[10] Moreover, victims of police overreaching can sue municipalities directly under 42 U.S.C. § 1983 for any unconstitutional policy. *See Monnell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). This option did not exist at the time of the *Miranda* decision. *See Monroe v. Pope*, 365 U.S. 167 (1961).

process, or malicious prosecution." 28 U.S.C. § 2680(h). Thus, victims may now sue both the government and individual law enforcement officers for abusive interrogation tactics. Section 3501, then, viewed in the proper context and considered within the landscape of legal remedies available to suspects whose rights have been violated, is constitutional because it substitutes other "fully effective" procedural safeguards for protecting the privilege against self-incrimination.

B. Congress' Determination That § 3501 Is Constitutional Is Entitled to Deference.

The Constitution imposes on all branches of government, not just the courts, a duty to comply with the Constitution. A necessary inference is that Congress is authorized to make its own judgments on constitutional issues, including whether a statute is constitutional. In fact, congressional findings can help support statutes that courts otherwise would invalidate on constitutional grounds. *See, e.g., United States v. Lopez*, 514 U.S. 549, 563 (1995) (noting that adequately drawn "congressional findings" might support a conclusion that "the activity in question substantially affected interstate commerce"); *Adarand Constr. Inc. v. Pena*, 515 U.S. 200, 236 (1995) (requiring Congress to justify affirmative action legislation with specific congressional findings); S. Rep. No. 1097, *supra*, at 62-63 (noting that "Congress on the basis of its determination of a factual issue has been allowed to mold constitutional policy").

Here, Congress held hearings, filed a comprehensive report, and engaged in extensive floor debate regarding whether § 3501 is constitutional. *See, e.g., Controlling Crime Through Effective Law Enforcement: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); S. Rep. No. 1097,

supra; 114 Cong. Rec. 11,200-07, 11,228-30, 11,234-35, 11,593-97, 11,611-13, 11,740-47, 11,891-907, 12,457-75, 12,477-81, 12,798-822, 12,829-36, 13,202-03, 13,652-56, 13,845-67, 13,989-14,084, 14,129-59, 14,162-84, 16,066-298 (1968). After doing so, it determined that the statute fully comports with the requirements of the Constitution. *See* S. Rep. No. 1097, *supra*, at 63; *see also* 18 U.S.C. § 3501.

In enacting § 3501, Congress did not trench upon the judiciary's ultimate authority to construe the Constitution in a case or controversy before the Court. *See City of Boerne v. Flores*, 521 U.S. 507, 516-29 (1997); *see generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Nor did it attempt to alter the meaning of the Fifth Amendment itself. Instead, it merely altered the judicially-created prophylactic safeguards surrounding the Fifth Amendment. *Cf. Smith*, 120 S. Ct. at 757-58. Congress made no attempt to direct the outcome of a particular case or class of cases. Rather, it merely established rules that courts must use in determining whether a particular piece of evidence should be admitted at trial.[11] Accordingly, § 3501 is distinguishable from the Religious Freedom Restoration Act ("RFRA"), which this Court held sought to impose Congress' interpretation of the First Amendment's Free Exercise Clause upon the Supreme Court. *See City of Boerne*,

---

[11] In enacting § 3501, Congress simply

> mandated that voluntary statements be admitted despite noncompliance with *Miranda*'s rules. Applying *Miranda* in such a case accordingly requires a federal court to violate an Act of Congress. Complying with the Act would involve no violation of a constitutional right of the defendant.

Office of Legal Policy, *Report to the Attorney General on the Law of Pre-Trial Interrogation: Truth in Criminal Justice* at 96 (Feb. 12, 1986), *reprinted in* 22 U. Mich. J.L. Reform 437 (1989).

521 U.S. at 519.[12]

In *City of Boerne*, this Court held that for a prophylactic measure to be upheld as truly remedial or preventive, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 508. In assessing the "proportionality" of a particular measure, courts are to consider whether (1) the record demonstrates "a pattern of constitutional violations" and (2) the measure is "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 644, 647 (2000) (quoting *City of Boerne*, 521 U.S. at 532). The requirement that prophylactic measures be proportional applies equally to congressionally enacted measures and to those created by courts in the exercise of their supervisory authority. If this were not so, then Congress' power to enact prophylactic measures by legislation would be narrower than the Court's power to adopt prophylactic measures pursuant to its supervisory power. In fact, the reverse may very well be true. *Compare Katzenbach*, 384 U.S. at 649-50 (1966) (upholding Congress' prophylactic ban on literacy tests for voting), *with Lassiter*, 360 U.S. at 53 (1959) (refusing to strike down literacy tests under Court's authority to enforce Equal Protection

---

[12] Moreover, § 3501 is distinguishable from RFRA because *Miranda*, unlike *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (the case to which RFRA responded), stressed that if it were "shown other procedures which are at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," then the *Miranda* rules could be dispensed with altogether. 384 U.S. at 467. The *Miranda* Court expressly invited Congress and the States to act. *See id.* Presumably, it expected some sort of legislative response to its decision.

Clause). Thus, neither Congress nor the Supreme Court has the authority to establish sweeping prophylactic measures that are disproportionate to the actual or potential injury.

The *Miranda* Court, however, established prophylactic measures – the now-familiar warnings and the automatic exclusion from evidence of unwarned confessions – that are not congruent or proportional to the injury to be prevented or remedied – the introduction into evidence of a confession compelled in violation of the Fifth Amendment. First, the record before the *Miranda* Court did not demonstrate a "pattern of constitutional violations." *Kimel*, 120 S. Ct. at 644. To the contrary, the record before the Court failed to demonstrate that police consistently force suspects to confess and then introduce such compelled confessions into evidence in violation of the Fifth Amendment. *See* Section I.B., *supra*. The Court, in fact, admitted that such occurrences "are undoubtedly the exception now." *Miranda*, 384 U.S. at 447. Second, *Miranda*'s irrebuttable presumption is "so out of proportion . . . that it cannot be understood as responsive to . . . unconstitutional behavior." *Kimel*, 120 S. Ct. at 647. The automatic exclusion of unwarned confessions is disproportionate because it does not reach the correct result – suppressing only coerced confessions – most of the time that it is applied. *See* Section I.B., *supra*. As such, *Miranda* fails the test this Court outlined in *City of Boerne* for distinguishing between permissible prophylactic measures adopted to remedy or prevent unconstitutional actions and impermissible attempts to rewrite constitutional protections disguised as prophylactic remedial measures. *See* 521 U.S. at 516-29. Given the absence in the record of a pattern of constitutional violations and the disproportional nature of the rule automatically excluding unwarned confessions, Congress itself could not constitutionally have enacted legislation adopting *Miranda*'s prophylactic measures.

Unlike the *Miranda* Court (and unlike Congress with respect to RFRA), Congress did not adopt sweeping, disproportional prophylactic measures when it enacted § 3501. Instead, Congress struck a reasonable balance between the injury to be prevented or remedied and the means adopted to that end. *See* Section I.C., *supra*; *cf. Katzenbach*, 384 U.S. at 649-50 (holding that Congress' ban of literacy tests was proportional to potential constitutional injury). Because Congress, exercising its independent judgment, determined that the statute does not run afoul of the Constitution, and because § 3501, in fact, does not lessen the constitutional protections afforded to suspects in custody, this Court should affirm the judgment below and uphold the constitutionality of the statute.

CONCLUSION

For the reasons set forth herein, Amici respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

SENATOR ORRIN G. HATCH
Counsel of Record

United States Senate
Washington, D.C. 20510
(202) 224-5225

Attorney for Amici Curiae

March 9, 2000

Mar 9 2000 (32)

Supreme Court, U.S.
FILED
MAR 9 2000
OFFICE OF THE CLERK

No. 99-5525

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

EDWIN MEESE III
The Heritage Foundation
214 Massachusetts Ave., NE
Washington, DC 20002
Phone: (202) 608-6180

KENT S. SCHEIDEGGER
Attorney of Record
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

BEST AVAILABLE COPY

41pp

QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U. S. C. § 3501, notwithstanding that the confession was taken without complying with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 3

I

Miranda's irrebuttable presumption creates no constitutional right, but rather is a rule of evidence 3

A. Rule of evidence 5

B. The nonconstitutional prophylactic 9

II

The Supreme Court can create common law rules for the adjudication of constitutional rights which are binding on the states but subject to revision by Congress 13

A. Federal interests. 13

B. Remedies and review 16

C. Legitimacy and danger 18

III

Upholding Section 3501 will begin a fresh round of democratic debate on the admissibility of confessions 21

IV

If *Miranda* cannot be explained as an exercise of this Court's constitutional common law powers, then it should be overturned 24

Conclusion 30

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U. S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) 26

Ailis-Chalmers Corp. v. Lueck, 471 U. S. 202, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985) 14

Arizona v. Roberson, 486 U. S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093(1988) 3, 22, 29

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 83 L. Ed. 195, 59 S. Ct. 191 (1938) 8

Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964) 14

Barr v. Matteo, 360 U. S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959) 16

Berkemer v. McCarty, 468 U. S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) 8

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) 16

Boyle v. United Technologies Corp., 487 U. S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988) 14, 15

Bram v. United States, 168 U. S. 532, 42 L. Ed. 568, 18 S. Ct. 183 (1897) 26, 27

Brecht v. Abrahamson, 507 U. S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) 22

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 11

California v. Prysock, 453 U. S. 355, 69 L. Ed. 2d 696,
101 S. Ct. 2806 (1981) 8

Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705,
87 S. Ct. 824 (1967) 17

City of Boerne v. Flores, 521 U. S. 507,
138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997) 19

Culombe v. Connecticut, 367 U. S. 568,
6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961) 4

Doyle v. Ohio, 426 U. S. 610, 49 L. Ed. 2d 91,
96 S. Ct. 2240 (1976) 22

Duckworth v. Eagan, 492 U. S. 195, 106 L. Ed. 2d 166,
109 S. Ct. 2875 (1989) 12, 25

Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378,
101 S. Ct. 1880 (1981) 11, 29

Erie R. Co. v. Tompkins, 304 U. S. 64,
82 L. Ed. 2d 1188, 58 S. Ct. 817 (1938) 12

Fare v. Michael C., 442 U. S. 707, 61 L. Ed. 2d 197,
99 S. Ct. 2560 (1979) 8

Harris v. New York, 401 U. S. 222, 28 L. Ed. 2d 1,
91 S. Ct. 643 (1971) 7, 9, 25

Haynes v. Washington, 373 U. S. 503, 10 L. Ed. 2d 513,
83 S. Ct. 1336 (1963) 4

Henslee v. Union National Bank, 335 U. S. 595,
93 L. Ed. 259, 69 S. Ct. 290 (1949) 13

Howard v. Lyons, 360 U. S. 593, 3 L. Ed. 2d 1454,
79 S. Ct. 1331 (1959) 16

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527,
103 S. Ct. 2317 (1983) 28

Illinois v. Perkins, 496 U. S. 292, 110 L. Ed. 2d 243,
110 S. Ct. 2394 (1990) 11

Illinois v. Wardlow, 528 U. S. __ (No. 98-1036,
Jan. 12, 2000) 19

In re Garnett, 141 U. S. 1, 35 L. Ed. 631,
11 S. Ct. 840 (1891) 14

In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368,
90 S. Ct. 1068 (1970) 18

Johnson v. New Jersey, 384 U. S. 719,
16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966) 9, 27, 29

Kimel v. Florida Bd. of Regents, 528 U. S. __
(No. 98-791, Jan. 11, 2000) 19

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 19

Maryland v. Wilson, 519 U. S. 408, 137 L. Ed. 2d 41,
117 S. Ct. 882 (1997) 11

McGuire v. United States, 273 U. S. 95, 71 L. Ed. 556,
47 S. Ct. 259 (1927) 29

McNeil v. Wisconsin, 501 U. S. 171, 115 L. Ed. 2d 158,
111 S. Ct. 2204 (1991) 4, 6, 26

Michigan v. Jackson, 475 U. S. 625, 89 L. Ed. 2d 631,
106 S. Ct. 1404 (1986) 11

Michigan v. Mosley, 423 U. S. 96, 46 L. Ed. 2d 313,
96 S. Ct. 321 (1975) 8

Michigan v. Payne, 412 U. S. 47, 36 L. Ed. 2d 736,
93 S. Ct. 1966 (1973) 5, 9

Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182,
94 S. Ct. 2357 (1974) 7, 9, 10, 25

Mincey v. Arizona, 437 U. S. 385, 57 L. Ed. 2d 290,
98 S. Ct. 2408 (1978) 9, 29

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) ..... Passim

Moragne v. States Marine Lines, Inc., 398 U. S. 375,
26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970) 14

Moran v. Burbine , 475 U. S. 412, 89 L. Ed. 2d 410,
106 S. Ct. 1135 (1986) 6, 11

New Jersey v. Portash, 440 U. S. 450, 59 L. Ed. 2d 501,
99 S. Ct. 1292 (1979) 9, 25

New York v. Quarles, 467 U. S. 649, 81 L. Ed. 2d 550,
104 S. Ct. 2626 (1984) 6, 25

Town of Newton v. Rumery, 480 U. S. 386,
94 L. Ed. 2d 405, 107 S. Ct. 1187 (1987) 15

Old Chief v. United States, 519 U. S. 172,
136 L. Ed. 2d 574, 117 S. Ct. 644 (1997) 20

Oregon v. Elstad, 470 U. S. 298, 84 L. Ed. 2d 222,
105 S. Ct. 1285 (1985) 6-12, 22, 25

Oregon v. Hass, 420 U. S. 714, 43 L. Ed. 2d 570,
95 S. Ct. 1215 (1975) 7, 25

Oregon v. Mitchell, 400 U. S. 112, 27 L. Ed. 2d 272,
91 S. Ct. 260 (1970) 19

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720,
111 S. Ct. 2597 (1991) 26

Public Citizen v. Department of Justice, 491 U. S. 440,
105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989) 8

Schweiker v. Chilicky, 487 U. S. 412, 101 L. Ed. 2d 370,
108 S. Ct. 2460 (1988) 16

Spencer v. Texas, 385 U. S. 554, 17 L. Ed. 2d 606,
87 S. Ct. 648 (1967) 20

Stovall v. Denno, 388 U. S. 293, 18 L. Ed. 2d 1199,
87 S. Ct. 1967 (1967) 2

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 2

United States v. Ceccolini, 435 U. S. 268,
55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978) 29

United States v. Dickerson, 166 F. 3d 667 (CA4 1999) ... 2

United States v. Washington, 431 U. S. 181,
52 L. Ed. 2d 238, 97 S. Ct. 1814 (1977) 4

Victor v. Nebraska, 511 U. S. 1, 127 L. Ed. 2d 583,
114 S. Ct. 1239 (1994) 19, 20

Watts v. Indiana, 338 U. S. 49, 93 L. Ed. 1801,
69 S. Ct. 1347 (1949) 4, 5

Withrow v. Williams, 507 U. S. 680, 123 L. Ed. 2d 407,
113 S. Ct. 1745 (1993) 8, 12

United States Constitution

U. S. Const., Art. III, § 2 13

United States Statutes

18 U. S. C. § 3501 21

18 U. S. C. § 3501(a) 21

18 U. S. C. § 3501(b)(3), (4) 21

28 U. S. C. § 2254 12

29 U. S. C. § 185(a) 14

State Constitution

Cal. Const., Art. VI, § 13 17

Foreign Statutes and Regulations

Criminal Justice and Public Order Act of 1994, § 34, 17 Halsbury's Statutes of England and Wales (4th ed. 1999) 23

Police and Criminal Evidence Act, Codes of Practice (rev. ed. 1999) 23

Police and Criminal Evidence Act of 1984, § 66, 12 Halsbury's Statutes of England and Wales (4th ed. 1997) 23

Treatises

4 W. Blackstone, Commentaries (1st ed. 1769) 24

R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) 17

1 R. Rotunda & J. Nowak, Treatise on Constitutional Law (3d ed. 1999) 14

3 J. Wigmore, Evidence (Chadbourn rev. 1970) 8

Miscellaneous

Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417 (1985) 6, 23, 27, 29

W. Churchill, Speech at the Lord Mayor's Day Luncheon (Nov. 10, 1942) 21

The Federalist No. 82 (C. Rossiter ed. 1961) (A. Hamilton) 14

H. Friendly, Benchmarks (1967) 7, 8, 13, 27

Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277 (1993) 8, 23

Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953) 16

Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1 (1994) 17, 18

Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) 13, 19

Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117 (1978) 15, 18

IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

INTEREST OF *AMICUS*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an attempt to remove from the people the power to decide when valid, probative evidence taken in compliance with the Constitution may be admitted in evidence. Such a result would be contrary to the interests CJLF was formed to protect.

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

Defendant Charles Dickerson has been indicted for the 1997 robbery of the First Virginia Bank in Alexandria, Virginia, among other offenses. J. A. 32. Dickerson accompanied FBI agents to the field office and gave a statement there. J. A. 141-142. The District Court suppressed this statement, finding that Dickerson was in custody, even though not formally arrested, and had not received the warnings required by *Miranda* v. *Arizona*. J. A. 151-155.

On motion for reconsideration, the government argued, "At all events, since there is no evidence or even serious allegation that Dickerson's statements were involuntary, the statements are admissible under 18 U. S. C. 3501(a), which provides that 'in any criminal prosecution brought by the United States . . . a confession *shall be admissible* if it is voluntarily given' (emphasis added)." J. A. 87. The District Court denied the motion. J. A. 156. The court refused to consider the government's additional evidence on the ground it was available at the time of the original hearing. J. A. 159-160. The District Court did not address the § 3501 argument.

The government appealed. However, it reversed its position on § 3501, on which it had previously relied, and asserted that the statute was unconstitutional, J. A. 163, *United States* v. *Dickerson*, 166 F. 3d 667, 671 (CA4 1999). The Court of Appeals held that the District Court was within its discretion to refuse to consider belated evidence. J. A. 164, 166 F. 3d, at 671. Regarding § 3501, the Court of Appeals noted, "Over the past few years, career federal prosecutors have tried to invoke § 3501 in this Court only to be overruled by the Department of Justice." J. A. 187, 166 F. 3d, at 681. The court nonetheless proceeded to decide the issue. J. A. 191, 166 F. 3d, at 683; cf. *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967) (case decided on retroactivity, even though raised only by *amicus*); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion) (same).

The Court of Appeals reversed, holding § 3501 was valid and that the District Court had implicitly held that the statement was voluntary. J. A. 211-212, 166 F. 3d, at 692. This Court granted certiorari, limited to Question 1. That question is the

constitutionality of § 3501. Pet. for Cert. i. The denied questions were the propriety of the Fourth Circuit's consideration of the issue and a Fourth Amendment claim. *Ibid.*

SUMMARY OF ARGUMENT

The *Miranda* rule is a rule of evidence. That case did not create any new constitutional rights. This Court's repeated characterizations of the *Miranda* rule as nonconstitutional are holdings, not dicta, necessary to the decisions in those cases.

The federal courts can create federal common law in certain specific cases of "uniquely federal interests." The federal law so created prevails over state law to the extent of any conflict, and when decided by the Supreme Court is binding precedent in state courts. Enforcement of federal constitutional rights is one of those areas.

A decision in this case upholding § 3501 would open the door to a fresh round of democratic debate on the admissibility of confessions. Further congressional action would be needed to lift the yoke of *Miranda* from state courts, but a favorable decision on § 3501 would provide the needed assurance that Congress can replace the *Miranda* rule. The legislative branch has superior flexibility to achieve a proper balance of interests.

If the Court is truly forced to a choice between constitutionalizing *Miranda* or overruling it, then it should overrule it. Either choice involves overruling precedents, so *stare decisis* does not indicate one choice over the other. The *Miranda* rule is not required by the Constitution.

ARGUMENT

I. *Miranda*'s irrebuttable presumption creates no constitutional right, but rather is a rule of evidence.

"[T]he rule of *Edwards* [v. *Arizona*, 451 U. S. 477 (1981)] is our rule, not a constitutional command . . . ." *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (Kennedy, J., dissenting). This is equally true of *Edwards*' parent decision, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

When this Court chose to regulate custodial interrogations in *Miranda*, it was stepping into one of the clearest conflicts between the interests of the accused and of society. While some innocent suspects may be able to clear themselves during the interrogation, the overwhelming majority of suspects are likely to damage their interests by incriminating themselves. As Justice Jackson pointed out, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in the result).

Yet society must be allowed to have its police interrogate suspects in custody. Banning custodial interrogation would effectively eliminate confessions from criminal trials. See *id.*, at 58. "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser" from too many restrictions on police interrogation. *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Voluntary confessions "are inherently desirable." *United States* v. *Washington*, 431 U. S. 181, 187 (1977). Indeed, obtaining proof beyond a reasonable doubt " 'often could not be achieved by the prosecution without the assistance of the accused's own statement.' " *Culombe* v. *Connecticut*, 367 U. S. 568, 576 (1961) (opinion of Frankfurter, J.). " 'Questioning suspects is indispensable in law enforcement.' " *Id.*, at 578. The public interest requires that police be allowed to conduct custodial interrogations. *Id.*, at 578-579. Custodial interrogation has long been understood to be "undoubtedly an essential tool in effective law enforcement." *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963).

Regulating police interrogations necessarily involves a balancing of interests. Every protection given to the custodial suspect is also an obstacle to solving crime. See *Culombe*, *supra*, 367 U. S., at 580. The amount of protection afforded the accused reflects a judgment on the relative worth of the interests of society and the accused: "Is it [defendant's] right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court

and also cannot question him before?" *Watts*, *supra*, 338 U. S., at 59 (Jackson, J., concurring in the result).

The *Miranda* decision swung the pendulum sharply towards the suspect's interests. This Court's policy judgment, given force through *Miranda*'s irrebuttable presumption and detailed code of procedure, created no constitutional right. See *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973). *Miranda* is a rule of evidence. This decision does not have the same force as a constitutional precedent, but is instead an exercise of this Court's constitutional common law powers. See Part II, *infra*, at 13-21. *Miranda*'s subconstitutional status allows Congress to substitute its view of the appropriate balance of interests for the Court's in this crucial area of public policy.

A. Rule of Evidence.

Although the 50-plus page opinion sprawled over a wide range of topics, in the end *Miranda* is simply an exclusionary rule. The Court summarizes its own holding as this: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, *supra*, 384 U. S., at 444.

Miranda's heart is found a few pages later.

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent. . . . The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Id.*, at 457.

"A *Miranda* violation does not *constitute* coercion but rather affords a bright-line legal presumption of coercion, requiring suppression of all unwarned statements." *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985) (emphasis in original); see also *New York* v. *Quarles*, 467 U. S. 649, 670 (1984) (O'Connor, J., concurring in judgment in part). *Miranda*'s presumption reflects this Court's choice of the appropriate balance between the suspect's protections from interrogation and society's need to solve crimes. See, *e.g.*, *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests"). *Quarles*, 467 U. S., at 658. Although the opinion declared that voluntary confessions were a "proper element in law enforcement," *Miranda*, *supra*, 384 U. S., at 478, the *Miranda* Court chose to tilt the balance sharply in favor of the criminal defendant. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). This balance carries out this Court's policy concerning police interrogation.

Miranda and subsequent decisions have noted the "inherently compelling pressures" of the interrogation room. See *Miranda*, *supra*, 384 U. S., at 467; *McNeil*, *supra*, 501 U. S., at 176; *Moran*, *supra*, 475 U. S., at 420. But this alone does not explain the *Miranda* presumption. While there may be some compulsion in any custodial interrogation, it must not be too compelling, since *Miranda* still allows waivers under these circumstances. See 384 U. S., at 535-536 (White, J., dissenting). If custodial interrogation were truly compelling as a matter of constitutional law, then the *Miranda* Court should have forbidden the practice.

As the *Miranda* Court implicitly recognized, there are many circumstances under which a suspect can give an unwarned, but still clearly voluntary custodial confession. In his dissent, Justice White produced a hypothetical that undercuts any presumption of compulsion in custodial interrogation.

> "Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as 'Do you have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary." *Miranda*, *supra*, 384 U. S., at 533-534 (White, J., dissenting).

Justice White's common sense is supported by the facts. Judge Henry Friendly's public response to *Miranda* underscored the practical soundness of Justice White's hypothesis. "[T]he books are full of instances, of which the Court must have been well aware through petition for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967). Next, Judge Friendly lists four then-recent cases in which there was no question that the custodial interrogation produced a voluntary confession. See *id.*, at 273, nn. 33-36 (citing *United States* v. *Cone*, 354 F. 2d 119 (CA2 1965); *United States* v. *Indiviglio*, 352 F. 2d 276 (CA2 1965); *Evalt* v. *United States*, 359 F. 2d 53 (CA9 1966); *United States* v. *D'Allesandro*, 361 F. 2d 694, 698 (CA2 1966)). In the years since *Miranda*, this Court has often found confessions to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, *supra*, 470 U. S., at 312; *Oregon* v. *Hass*, 420 U. S. 714, 722 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971). The District Court implicitly found that in the present case. See *supra*, at 2. "One could go on endlessly; there are countless instances where a man apprehended with clear evidence of crime on his person or identified by witnesses will respond without the slightest pressure if obstacles are not artificially put in his way." Friendly, *supra*, at 273. There must be more to *Miranda* than any compulsion inherent in custodial interrogations.

The policy that ties *Miranda*'s many strands together is dissatisfaction with administering the voluntariness standard. See Gardner, Section 1983 Actions under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1281-1282 (1993). This explains *Miranda*'s focus on custody. A station house can be very difficult for judicial scrutiny to penetrate. The *Miranda* rule finesses the problems with custody by overprotecting the Fifth Amendment privilege. Thus, "*Miranda*'s core virtue was affording police *and courts* clear guidance on the manner in which to conduct a custodial investigation." *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993) (emphasis added; internal quotations omitted). See also *California* v. *Prysock*, 453 U. S. 355, 359 (1981) (*per curiam*) (*Miranda* "obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions"); *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). So long as *Miranda*'s i's are dotted and t's crossed, courts have much less need to undertake the potentially messy task of penetrating the interrogation room and utilizing the voluntariness test. Cf. *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984) (cases of colorable argument of compulsion when *Miranda* rule is followed are "rare").

The *Miranda* rule achieves this goal through a detailed code of interrogation procedure. See *Miranda*, *supra*, 384 U. S., at 504 (Harlan, J., dissenting); Friendly, *supra*, at 267-268 (*Miranda* as legislation); 3 J. Wigmore, Evidence § 826a, p. 383 (Chadbourn rev. 1970) (*Miranda* as "new 'code' "). The code is sufficiently complex that it must be interpreted by this Court. Compare *Michigan* v. *Mosley*, 423 U. S. 96, 102 (1975) (avoiding a literal interpretation of *Miranda* that would lead to an absurd result), with *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 454 (1989); *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332-333 (1938) (statutory canon of avoiding literal interpretation that would lead to absurd results). *Miranda*'s code operates as a rule of evidence, an exclusionary rule. See *Elstad*, *supra*, 470 U. S., at 306 ("The *Miranda* exclusionary rule"). This rule of evidence is not a constitutional right, but, as this Court has often held, a prophylactic rule that overprotects the Fifth Amendment privilege to

advance this Court's policies through its constitutional common law function.

B. The Nonconstitutional Prophylactic.

Because *Miranda* is a rule of evidence that sweeps more broadly than the Fifth Amendment privilege, it creates no constitutional right. This is demonstrated by the many limits this Court has placed on *Miranda*. In *Johnson* v. *New Jersey*, 384 U. S. 719, 721 (1966), this Court declined to apply *Miranda* retroactively. It labeled *Miranda*'s procedures as "safeguards." *Id.*, at 730. Retroactively applying *Miranda* "would require the retrial or release of numerous prisoners found guilty *by trustworthy evidence* in conformity with previously announced constitutional standards." *Id.*, at 731 (emphasis added). If the act of taking a confession contrary to *Miranda* were truly unconstitutional, *i.e.*, if those confessions were truly compelled, then the evidence would be suspect and the case for retroactivity would have been much stronger. See *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973).

The next chink in *Miranda*'s armor was found in *Harris*, *supra*, 401 U. S., at 226, which held that voluntary statements taken contrary to *Miranda* can be used to impeach the defendant's testimony. The deterrent of *Miranda*'s exclusionary rule was satisfied by excluding the evidence from the State's case-in-chief. *Id.*, at 225. By contrast, statements that are in fact unconstitutionally compelled cannot be admitted for impeachment. See *Mincey* v. *Arizona*, 437 U. S. 385, 397-398 (1978). Compelled statements are not the same as merely un-*Mirandized* statements. See *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979). Application of *Miranda* permits balancing because it involves no actual constitutional violation, while use of actually compelled statements is constitutionally prohibited, permitting no balancing. See *infra*, at 25.

The cases which nail down the nonconstitutional status of *Miranda* are the "fruit of the poisonous tree" cases: *Michigan* v. *Tucker*, *supra*, and *Oregon* v. *Elstad*, *supra*. *Tucker* involved a statement taken with advisements and a waiver but without notice that a lawyer would be provided without charge if the suspect could not afford one. See 417 U. S., at 436. The

statement itself was suppressed, but the testimony of a witness revealed by the statement was admitted. *Id.*, at 436-437. The questioning was before *Miranda*, but the trial was afterward, and hence *Miranda* applied. *Id.*, at 435.

Tucker's argument was that the "fruit of the poisonous tree" doctrine developed in Fourth Amendment cases required exclusion of the "fruit." The *Tucker* Court rejected the argument based squarely on the nonconstitutional status of *Miranda*.

> "This Court has also said, in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), that the 'fruits' of police conduct which *actually* infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here *did not abridge respondent's constitutional privilege against compulsory self-incrimination*, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Thus . . . there is no controlling precedent . . . to guide us." *Id.*, at 445-446 (footnote omitted; emphasis added).

While the *Tucker* Court arguably might have distinguished *Wong Sun* on some other ground, it actually distinguished that case on the constitutional versus nonconstitutional status of rules violated. See also *id.*, at 444. This is the *ratio decidendi* of the case.

Oregon v. *Elstad*, *supra*, reiterates this holding. That case involved a claim that a properly warned statement of the defendant himself was "tainted" by a prior, unwarned statement, again relying on *Wong Sun*. See *Elstad*, *supra*, 470 U. S., at 302-303. The Court noted that Elstad's *Wong Sun* argument "assumes the existence of a constitutional violation." *Id.*, at 305. That assumption was incorrect. The *Elstad* Court reaffirmed *Tucker*'s holding that *Wong Sun* was not controlling because "there was no actual infringement of the suspect's constitutional rights . . . ." *Id.*, at 308.

In dissent, Justice Stevens made precisely the argument that the government and the defendant make in the present case, *i.e.*, that the authority of the Court to impose the *Miranda* rule on the states necessarily implies that the rule is constitutionally

required. *Id.*, at 370-371. The *Elstad* Court rejected that argument. See *id.*, at 306-307, n. 1 (majority opinion); cf. *id.*, at 370, n. 15 (Stevens, J., dissenting). The Court reaffirmed that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.*, at 306, n. 1. *Miranda* is a nonconstitutional rule of evidence. See *supra*, at 6.

Against the square holdings of *Tucker* and *Elstad*, where the nonconstitutional status of *Miranda* was the *ratio decidendi* of the case, the government submits *obiter dicta* in cases where the status made no difference. See Brief for the United States 24-25. *Illinois* v. *Perkins*, 496 U. S. 292, 296 (1990) held that the inherent compulsion in *Miranda* did not extend to the undercover agent situation, and hence the rule did not extend there. *Butler* v. *McKellar*, 494 U. S. 407, 411 (1990) merely described the holding of an earlier case. Such a description is dictum. See *Maryland* v. *Wilson*, 519 U. S. 408, 412 (1997). *Michigan* v. *Jackson*, 475 U. S. 625, 629-630 (1986) involved the Sixth Amendment right to counsel. Whether the *Miranda* rule was itself required by the Fifth Amendment was not before the Court. *Moran* v. *Burbine*, *supra*, 475 U. S., at 419, involved a lower court holding that failure to inform an arrestee that an attorney had called fatally tainted an otherwise valid waiver of the self-incrimination privilege. This Court reversed because such a rule "would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all." *Id.*, at 427. That holding and the reason for it did not depend on the status of *Miranda* as constitutional versus prophylactic. The tangential reference to "our interpretation of the Federal Constitution," *ibid.*, cannot be understood to overrule the square holding of *Elstad*, decided only a year earlier and authored by the same Justice, or *Tucker*, a decision it quotes on this very point. See *id.*, at 424-425 (quoting *Quarles* quoting *Tucker*). Finally, *Edwards* v. *Arizona*, 451 U. S. 477, 481 (1981) merely makes another passing reference to the holding of an earlier case, which is dictum. *Edwards* reconfirmed the holdings of earlier cases, see *id.*, at 485, and the constitutional status of the rules was not in issue.

The government relies on a statement from *Withrow* v. *Williams*, *supra*, that "[p]rophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental trial right," 507 U. S., at 691 (emphasis and internal quotation marks omitted). This did not establish *Miranda* as a constitutional right. On the contrary, the decision is expressly premised on the assumption "that *Miranda*'s safeguards are not constitutional in character . . . ." *Id.*, at 690.[2] The government is incorrect when it attempts to separate *Miranda*'s status as a prophylactic rule from its nonconstitutional status. See Brief for the United States 24-25. "Like all prophylactic rules, the *Miranda* rule 'overprotects' the value at stake." *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring). *Miranda* is prophylactic because it "sweeps more broadly than the Fifth Amendment itself" "and may be triggered even in the absence of a Fifth Amendment violation." *Elstad*, *supra*, 470 U. S., at 306. Since its rule goes beyond what the Fifth Amendment requires, the *Miranda* prophylactic logically must be extraconstitutional.

The nonconstitutional status of *Miranda* is inescapable. The policy reasons that form its rationale, its extraconstitutional scope, and the many limits this Court has placed on the initial *Miranda* ruling all point to a decision that involves something other than a constitutional right. The *Miranda* Court chose to displace analysis of the actual voluntariness of the custodial confession with a prophylactic bright-line rule that purported to keep courts from having to penetrate the interrogation room in any great depth. *Miranda* therefore is best explained as an

---

2. The unequivocal holding of *Withrow*, that diminished review on habeas does not follow from nonconstitutional status, *ibid.*, demolishes the argument that constitutional status may be inferred from cognizability on habeas. See Brief for the United States 24. The argument that the word "laws" in 28 U. S. C. § 2254(a) can only refer to statutes, not common law, is patently meritless in any event. The opposite proposition had been established in one of the great cases of American jurisprudence a mere ten years before Congress enacted § 2254. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 72-73 (1938). Congress was surely aware of that construction.

exercise of this Court's constitutional common law function, which can be revised by Congress.

II. The Supreme Court can create common law rules for the adjudication of constitutional rights which are binding on the states but subject to revision by Congress.

The defendant and the government assert that the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) must be required by the Constitution, because otherwise it could not be binding on state courts. See Brief for the United States 23-24; Brief for Petitioner 20-21. They assert this with all the confidence of a bridge player who has just led the ace of trumps for the rubber trick, and thus gloss over the main point of this case.

Their ace is actually a deuce. There are many areas of law in which this Court establishes federal common law (*i.e.*, judge-made) rules binding on the states yet subject to revision or abrogation by Congress. *Miranda* is just one of many.

The theory of the legitimacy of such rules is laid out in Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). The defense lawyer *amici* refer to this work disparagingly as a "twenty-five-year-old law review article," see Brief for National Ass'n of Criminal Defense Lawyers et al. as *Amici Curiae* 16, as if the force of the argument is somehow diminished merely by the passage of time. Wisdom too often never comes, and so one ought not reject it merely because it came early. Cf. *Henslee* v. *Union Planters Bank*, 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

A. Federal Interests.

"The clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law." H. Friendly, Benchmarks 178 (1967). There are many areas which this Court has held to be governed by federal law even though that law cannot be found in the Constitution or any Act of Congress. Admiralty and maritime law is one such area. The Constitution includes these cases in the jurisdiction of federal courts. See U. S. Const., Art. III, § 2. However, the courts of one sovereign may hear cases arising under the laws

of another, see The Federalist No. 82, p. 493 (C. Rossiter ed. 1961) (A. Hamilton), so it does not follow that the substance of maritime law must be federal. Even so, this Court does hold that the law is federal, see, *e.g.*, *Moragne* v. *State Maritime Lines, Inc.*, 398 U. S. 375, 401, n. 15 (1970), fashioned by courts in the absence of congressional action but always subject to revision by Congress. See *In re Garnett*, 141 U. S. 1, 12 (1891); 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 3.4, pp. 352-355 (3d ed. 1999).

Federal common law, and not the state law of contracts and shipping documents, determined the outcome in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964). In a diversity jurisdiction case, see *id.*, at 421, n. 20, the federal common law "act of state doctrine" was held controlling. See *id.*, at 439. Although it has "constitutional underpinnings," this doctrine is not constitutionally required, see *id.*, at 423, yet it determined the outcome of a case otherwise governed by state law.

Labor contracts are another area where federal common law has trumped state law. Congress has assigned labor contract cases to federal courts, 29 U. S. C. § 185(a), and this statute, purely jurisdictional on its face, has been held to "express[ ] a federal policy that the substantive law to apply . . . 'is federal law, which the courts must fashion from the policy of our national labor laws.' " *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 209 (1985) (quoting *Textile Makers* v. *Lincoln Mills*, 353 U. S. 448, 456 (1957)). Under this doctrine, *Allis-Chalmers* reversed the judgment of a state court in a state-law tort case, on the ground that allowing the tort claim would subvert the congressional goal of a unified body of labor contract law. *Id.*, at 220.

Federal interests similarly scuttled a state-law tort suit in *Boyle* v. *United Technologies Corp.*, 487 U. S. 500 (1988). No federal statute proscribed this design defect suit against a federal contractor.

> "But we have held that a few areas, involving 'uniquely federal interests,' [citation] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.' " *Id.*, at 504 (citing *Banco Nacional*, *supra*, and other cases).

The existence of federal common law binding on state courts is not an "untenable theory," cf. Brief for the United States 26, but rather a legal doctrine established beyond serious dispute. The government's catalog of prophylactic rules, see *id.*, at 44-47, confirms rather than refutes that criminal procedure cases are included.

Those seeking to discredit the federal common law thesis as applied to criminal procedure have claimed it is limited to cases where uniformity is the federal interest. See Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117, 1134 (1978). *Boyle* negates this notion. The federal interest threatened by the state tort law was the ability of the government to get its contracts filled at the lowest possible price, *Boyle*, *supra*, 487 U. S., at 507, not uniformity of law. The touchstone is "uniquely federal interests," *id.*, at 504, which might be a need for uniformity, see *id.*, at 508, or might be something else.

That "something else" may be enforcement of federal rights, whether constitutional or statutory. In *Town of Newton* v. *Rumery*, 480 U. S. 386, 390-391 (1987), the plaintiff had entered into a contract releasing his federal civil rights claims, primarily Fourth Amendment claims, against the town. The Court held perfunctorily that the validity of the release would be governed by federal law. *Id.*, at 392. That law was not established by statute. It was determined by courts "by reference to traditional common-law principles." *Ibid.*

Considering *Town of Newton* in light of *Boyle*, we may ask what is the "uniquely federal interest" that allows federal common law to override otherwise applicable state law on the validity of contracts. Only one interest appears pertinent—the federal interest in enforcing the Fourteenth Amendment, including the "incorporated" provisions of the Bill of Rights. That is precisely the same interest involved in the remedies and criminal procedure cases.

B. Remedies and Review.

When one person has wrongfully injured another in his person, property, or reputation, the usual remedy is damages in tort in a suit brought under state law. However, when the malefactor is an employee of the federal government and the wrong is a violation of the Constitution, the plaintiff will find his remedy governed largely by federal law, primarily judge-made federal law.

On one side, the plaintiff who seeks traditional tort remedies will find the reach of the state law remedy limited by the doctrine of immunity. In *Barr* v. *Matteo*, 360 U. S. 564 (1959) and *Howard* v. *Lyons*, 360 U. S. 593 (1959), the plaintiffs brought libel suits under local defamation law. See *Barr*, at 577, n. * (Black, J., concurring in the judgment). Both suits were barred by a body of federal law, which "has in large part been of judicial making." *Id.*, at 569 (plurality opinion). This federal common law prevailed over state and District of Columbia law, but it was subject to the power of Congress to substitute a different rule. See *id.*, at 577 (Black, J., concurring in the judgment).

On the other side of the remedial coin, we find *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). That case created, in effect, a federal common law tort action for the violation of federal constitutional rights by federal officers. The *Bivens* action, however, is not constitutionally required. Congress has broad powers over the scope of remedies. In *Schweiker* v. *Chilicky*, 487 U. S. 412 (1988), the Court declined to extend *Bivens* to a case of denial of a benefit without due process because Congress had provided another remedy, even though that remedy fell well short of complete relief. *Id.*, at 425. "It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension." Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1366 (1953).

Given these rules, we may ask several questions. By what authority does the United States Supreme Court block a state-

law tort action when no federal statute or constitutional provision forbids it? By what authority does the Court authorize a federal-question lawsuit by one individual against another in the absence of a statute providing an action? And by what authority does Congress substitute an incomplete remedy for that cause of action?

The answer must be that protection of federal constitutional rights and protection of federal employees from lawsuits over the performance of their duties are "uniquely federal interests" within the meaning of *Boyle*, *supra*. Courts create the governing law, but Congress has the last word if it chooses to speak. Either way, federal law prevails over state law to the extent of a conflict. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 876-877 (4th ed. 1996).

The rule of *Chapman* v. *California*, 386 U. S. 18 (1967) is analogous to *Bivens*. See Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1, 29-30 (1994). A criminal appellant with a constitutional claim, like a *Bivens* plaintiff, is the moving party, claims that his rights have been violated, claims he has been injured by the violation, and seeks relief. The injury and relief components of the claim are where federal common law comes in.

Chapman involved a state constitutional provision, the predecessor of Cal. Const., Art. VI, § 13, which established a standard for deciding reversible versus harmless error. See *Chapman*, *supra*, 386 U. S., at 20, n. 3. *Chapman* held that federal law overrode the state standard. *Id.*, at 20-21. "The *Chapman* opinion was cryptic, however, about the source of the rule it announced." Meltzer, *supra*, 61 U. Chi. L. Rev., at 2. Space does not permit an extended discussion here, but Professor Meltzer reviews the possible sources and concludes "that the harmless error rule should be seen as constitutional common law." *Id.*, at 26. In particular, the *Chapman* standard is not mandated by the Constitution. See *id.*, at 24-26. As the *Chapman* opinion itself states, the responsibility, and presumably the authority, of the Court to fashion a rule exists only "in the absence of appropriate congressional action." 386 U. S., at 21. A court-made rule which overrides a state constitutional

provision, yet is subject to revision by Congress, can only be explained as federal common law.

Miranda and *Chapman* are strongly analogous in that both rules recognize the inherent uncertainty of the underlying determination, and both are based on an assessment of the relative harm of erring in one direction versus the other. See *supra*, at 6. If we always knew to a certainty whether an error contributed to a verdict or not, there would be no need for a harmless error "standard." Errors known to be harmful would be remedied by reversal, and those known to be harmless would not. A standard of "beyond a reasonable doubt" implements a value judgment that error in one direction is far worse than error in the other. See *In re Winship*, 397 U. S. 358, 364 (1970). The *Chapman* standard accepts reversal of a large number of judgments for errors which probably did not affect the verdict as the price for fixing those errors that did affect the verdict, but which might be erroneously judged harmless under a lesser standard. That reasonable people might differ on this value judgment is illustrated by the large number of states with less rigid rules before *Chapman*. See Meltzer, *supra*, 61 U. Chi. L. Rev., at 22, n. 89. *Miranda* similarly skews the risk of error. A large number of voluntary, and hence constitutional, confessions are excluded in order to minimize the risk of erroneously letting in an occasional involuntary one. See *supra*, at 6-7. *Miranda* and *Chapman* belong to the same species. Both are federal common law rules, created to safeguard constitutional rights but not themselves constitutionally required.

C. Legitimacy and Danger.

The objection is made that recognizing such a common-law-making power in this Court would dangerously expand the Court's power. See Schrock and Welsh, *supra*, 91 Harv. L. Rev., at 1126-1127. There are two answers. First, the power should be carefully limited to that needed to effectuate constitutional rights and not to expand the scope of those rights, similar to the limits on Congress's power under § 5 of the Fourteenth Amendment. Second, however dangerous the power to make rules like *Miranda* might be if they are subject to revision by Congress, the power to make the same rules

immune from revision by Congress would be vastly more dangerous.

Amicus parts company with Professor Monaghan when he says constitutional common law could be used "to impose on the states . . . all the best features of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence." Monaghan, *supra*, 89 Harv. L. Rev., at 43. That would be precisely the supervisory power this Court has always disclaimed. See, *e.g.*, *Victor* v. *Nebraska*, 511 U. S. 1, 17 (1994).

The proper line of demarcation is between the scope of the right and the enforcement of the right. This is the same line that marks the limit of Congress's enforcement powers. Congress cannot expand the substantive scope of rights so as to take from states powers left to them by the Constitution. See *City of Boerne* v. *Flores*, 521 U. S. 507, 519 (1997). Enforcement may sometimes sweep more broadly than the constitutional provision itself, when necessary to protect a right from being denied in practice through the burden and uncertainty of case-by-case litigation. A ban on all literacy tests for voting, for example, swept out valid tests along with the ones so notoriously used for racial discrimination, yet the ban was valid. See *Oregon* v. *Mitchell*, 400 U. S. 112, 283-284 (1970) (Stewart, J., concurring in part and dissenting in part). This Court refers to such legislation as "prophylactic," see *Kimel* v. *Florida Bd. of Regents*, 528 U. S. __ (No. 98-791, Jan. 11, 2000) (slip op., at 24), the same word it uses to describe *Miranda*.

As applied to criminal procedure, enforcement consists of two kinds of rules. Some enforcement rules govern the procedure and evidence by which a court determines whether a violation has occurred, or, in self-incrimination suppression hearings, whether admission of the evidence would be a violation. The other kind of enforcement rule is a rule of remedy. Once a court determines a violation has occurred, what, if anything, does it do about it? *Chapman* and *Mapp* v. *Ohio*, 367 U. S. 643 (1961) are rules of remedy. These two kinds of rules are different from rules defining the scope of the right, such as whether a detention is "reasonable," see, *e.g.*, *Illinois* v. *Wardlow*, 528 U. S. __ (No. 98-1036, Jan. 12, 2000),

or whether a definition of "reasonable doubt" comports with the Due Process Clause. See, *e.g.*, *Victor*, *supra*, 511 U. S., at 15.

The distinction can be illustrated by comparing the law of admissibility of confessions with the law of admissibility of prior convictions. The better practice, it is widely recognized, is to keep the information on prior convictions presented to the jury to the minimum the jury needs to answer the questions before it. See *Old Chief* v. *United States*, 519 U. S. 172, 185-186 (1997). This Court can require federal district courts to observe that practice in federal prosecutions, either by supervisory power or by extrapolation from the very general wording of federal rules. See *id.*, at 191-192. However, there is no constitutional prohibition against telling the jury about the priors. See *Spencer* v. *Texas*, 385 U. S. 554, 563 (1967). As there is no constitutional violation and no danger of one, this Court has no authority to impose the better practice on the states. See *id.*, at 564. With confessions, the Constitution draws the line at voluntariness. The Constitution itself excludes confessions which are actually over the line, and the federal enforcement power is limited to excluding those which present an unacceptable risk of being over the line. How much risk is acceptable is a policy choice subject to congressional revision.

Miranda thus falls with a narrow definition of the constitutional common law, one that can be adopted without making the federal judiciary a more dangerous branch than it already is. The competing proposition, that this Court should constitutionalize *Miranda*, involves a far greater danger. Indeed, the very idea that judicial restraint could be proffered as a rationale for this step is remarkable, to say the least. As we discuss in part IV, *infra*, at 26, *Miranda* had no basis in precedent or in the text or history of the Constitution. If the Fifth Amendment did not require this formulation when it was adopted, did not require it when it was "incorporated" in the Fourteenth, and did not require it any time prior to 1966, how can it require it today? That would be possible only if this Court had the power to enlarge the scope of constitutional rights based on its own notions of policy, as opposed to construing the Constitution based on its text and history to determine what rights it actually confers. The power to not only promulgate a

rule like *Miranda* but also to place it above congressional revision would be vastly more dangerous than a properly limited common law enforcement power.

III. Upholding Section 3501 will begin a fresh round of democratic debate on the admissibility of confessions.

A decision upholding 18 U. S. C. § 3501 would not be the end of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). It would not even be the beginning of the end. It might be the end of the beginning. Cf. W. Churchill, Speech at the Lord Mayor's Day Luncheon (Nov. 10, 1942), quoted in J. Bartlett, Familiar Quotations 746 (15th ed. 1980).

The statute, by its terms, applies only to federal prosecutions. See § 3501(a). These are the cases where *Miranda* was least needed. Federal law enforcement had already adopted a form of warning before *Miranda*, see 384 U. S., at 483-484, and doubtless will continue giving warnings under the statute. See § 3501(b)(3), (4) (warnings are a factor in determining voluntariness); see also Brief for FBI Agents Association as *Amicus Curiae*. As federal common law, *Miranda* will continue as controlling precedent in state courts unless and until Congress replaces it with a different rule. Upholding § 3501 would make a dramatic change in the legislative landscape, however, by confirming that Congress does have broad power to prescribe the rules of procedure and evidence for the adjudication of self-incrimination claims.

Those who view the American people as knuckle-dragging Neanderthals with contempt for the Bill of Rights recoil in horror at the very suggestion that the people, through the democratic process, might review and revise the inspired wisdom of *Miranda*. *Amicus* CJLF has a more optimistic view of our countrymen.

Defendant asserts that *Miranda* has widespread acceptance beyond the legal culture, Brief for Petitioner 44, *i.e.*, among the public as a whole. To the extent this statement refers to the core *Miranda* holding—mandatory warnings for suspects actually arrested—we concur. That is why the warnings are in little or no danger from future congressional action. Although

Congress could simply make §3501 apply to the states, it is unlikely to do so. The 1968 act was a legislative overreaction to judicial overreaching: Newton's Third Law applied to politics. Now that tempers have cooled for over three decades, a fresh examination by Congress will surely produce a more nuanced approach. The assertions of law enforcement support for giving the warnings, see Brief of Griffin B. Bell *et al.* as *Amici Curiae* 8-11, are beside the point.

The government notes, and *amicus* agrees, that the core *Miranda* requirement is easily applied. Brief for the United States 34-35. The government further notes, again correctly, that the extensions of *Miranda* have blurred the bright line that was originally the rule's greatest virtue. See *id.*, at 35-36. Even the original rule loses its bright-line character when applied to persons who claim to have been "in custody," even though not formally arrested, see *id.*, at 36, n. 26, as the present case vividly illustrates. Difficult questions of voluntariness are simply replaced by "murky and difficult questions of when 'custody' begins." *Oregon* v. *Elstad*, 470 U. S. 298, 316 (1985).

Surprisingly, the government submits these observations in support of an argument to cast *Miranda* into constitutional concrete. *Amicus* submits that these are powerful arguments to return the issue to legislative control. Congress could require the warnings for those formally arrested and then specify in objective terms what other circumstances will trigger the requirement. Congress could reconsider whether an appropriate weighing of the costs and benefits really warrants the rule of *Arizona* v. *Roberson*, 486 U. S. 675 (1988), and it could do so free of the baggage of *stare decisis*.

As another example, the rule of *Doyle* v. *Ohio*, 426 U. S. 610 (1976) excludes valid, probative evidence. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 628 (1993). It does so even though use of an arrestee's silence does *not* violate the self-incrimination privilege. *Ibid.* It does so only because the use contradicts the implied promise of the mandatory warnings. *Id.*, at 628-629. Once the language of the warnings is under legislative control, Congress could deal with this problem by altering the wording of the warnings, thus restoring a valid and

valuable source of evidence needlessly excluded by current doctrine.

In Britain, the warnings are established by regulation. See Police and Criminal Evidence Act of 1984, § 66, 12 Halsbury's Statutes of England and Wales 873 (4th ed. 1997). The opposite of our *Doyle* rule is established by statute, see Criminal Justice and Public Order Act of 1994, § 34, 17 Halsbury's Statutes, at 278-279, and so the warning was modified to conform. *Id.*, at 279, notes. British arrestees are now warned, "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence." Police and Criminal Evidence Act, Codes of Practice, Code C § 10.4 (rev. ed. 1999). This warning, *amicus* submits, strikes the balance better than *Miranda*/*Doyle*. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469 (1985).

A legislatively controlled law of confessions could take better advantage of changing technology. As recording becomes easier and cheaper, a rule to record all station-house interrogations might be a preferable substitute. See Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1287 (1993). To find out whether it is, Congress could authorize a pilot program limited in time and territory, something the judicial branch could never do through legitimate constitutional jurisprudence.

The original *Miranda* opinion invited legislative participation, see 384 U. S., at 467, but under conditions no responsible legislator could support. The invitation to construct alternatives came with the implied threat to strike them down *ex post facto* if the Court found they did not provide equally effective protection for the suspect. See *ibid.*; Gardner, *supra*, 30 Am. Crim. L. Rev., at 1287. Invalidation of a standard practice is a disaster, requiring an already overburdened system to retry and possibly set free thousands of convicted criminals. *Miranda*'s invitation gave legislatures a choice between a procedure the Court had endorsed and a stroll through a minefield. While a state might add additional procedures on

top of *Miranda*, no responsible legislature or executive could risk experimenting with a substitute under such conditions. Only a recognition of broad congressional authority, without the strict scrutiny implied by *Miranda*, will invigorate a fresh democratic debate.

The main impediment to legislative action to enforce the Fifth Amendment is not hostility to civil liberties but simply inertia. Criminal law is not high on the legislative priority list, a problem of long standing. See 4 W. Blackstone, Commentaries 4 (1st ed. 1769).[3] In this case, inertia is on *Miranda*'s side. That precedent remains applicable to the states until new congressional action provides a substitute.

It is high time for a fresh examination of the tangled mass of rules and subrules that make up the body of jurisprudence begun by *Miranda* and extended by cases such as *Roberson* and *Doyle*. The legislative branch has the flexibility and adaptability the task requires. It is time to remove the *Miranda* straitjacket and allow the people's representatives to resolve these issues. *Amicus* CJLF urges the Court to throw open the doors and let in the fresh air of a robust new round of democratic debate.

IV. If *Miranda* cannot be explained as an exercise of this Court's constitutional common law powers, then it should be overturned.

The government first asserts that there are only two paths this Court can follow—constitutionalize *Miranda* or overrule it. Brief for the United States 29. The government then asserts *stare decisis* as blocking the overruling path, leaving only constitutionalization. *Id.*, at 29-31. The defendant makes a similar argument. Brief of Petitioner 30-31.

---

3. "Were even a committee appointed but once in a hundred years to revise the criminal law, it could not have continued to this hour [1769] a felony without benefit of clergy [*i.e.*, a capital offense], to be seen for one month in the company of persons who call themselves, or are called, Egyptians."

Actually, *stare decisis* blocks *both* paths. If the Court is really forced to the choice the government asserts is necessary, then it will have to overrule some precedent—either *Miranda* itself with all its progeny or the many cases holding that the Constitution does not require the *Miranda* rule.

As noted earlier, this Court has often labeled *Miranda*'s rules and procedures, not as constitutional rights themselves, but as prophylactic safeguards for the Fifth Amendment privilege. See *supra*, at 9-13. Such statements are not dicta, but instead play a central role in limiting *Miranda*'s invasive regulation of police procedure. Thus in *New York* v. *Quarles*, 467 U. S. 649, 655-658 (1984), this Court could engage in a balancing of interests and craft a public safety exception to *Miranda* because "[t]he prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution.' " *Id.*, at 654 (quoting *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974)). By comparison, the constitutional right to be free from compelled self-incrimination is not amenable to any policy related to balancing of interests. In *New Jersey* v. *Portash*, 440 U. S. 450 (1979), this Court held that compelled but immunized testimony could not be used to impeach the declarant in a subsequent criminal proceeding. This Court distinguished such testimony from statements taken contrary to *Miranda*, which can be used to impeach. See *Oregon* v. *Hass*, 420 U. S. 714, 723-724 (1975); *Harris* v. *New York*, 401 U. S. 222, 225 (1971).

> "Balancing of interests was thought to be necessary in *Harris* and *Hass* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the *constitutional* privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *Portash*, *supra*, 440 U. S., at 459 (emphasis added).

The limits on *Miranda* such as those found in *Quarles*, *Harris*, *Hass*, *Michigan* v. *Tucker*, 417 U. S. 433, 445 (1974) (fruit of the poisonous tree doctrine inapplicable to *Miranda*), *Oregon* v. *Elstad*, 470 U. S. 298, 308 (1985) (same), *Duckworth* v. *Eagan*, 492 U. S. 195, 203 (1989) (variation on

Miranda warnings), and *McNeil* v. *Wisconsin*, 501 U. S. 171, 180-182 (1991) (request for counsel at judicial proceeding is not a *Miranda* invocation) would probably not survive *Miranda*'s transformation from a nonconstitutional prophylactic to a constitutional right. The balancing of interests that is the hallmark of most of this Court's *Miranda* jurisprudence cannot be squared with a decision in this case equating the *Miranda* procedures with the actual Fifth Amendment privilege. Transforming *Miranda* into a constitutional right would leave this Court with two choices: either raise *Miranda* violations to the level of actually, as opposed to presumptively, compelled self-incrimination, and thus overruling much of its *Miranda* jurisprudence, or lower Fifth Amendment standards by treating all instances of compelled self-incrimination as this Court currently treats *Miranda* violations, which would require overturning many Fifth Amendment cases. Whether this Court raises *Miranda* or lowers the Fifth Amendment standard, much of its jurisprudence would have to be overturned.

This eliminates *stare decisis* as a justification for preserving a constitutionalized *Miranda* rule. *Stare decisis* should not prevent the reexamination of an inconsistent line of cases, such as when later decisions erode the authority of earlier cases. See *Agostini* v. *Felton*, 521 U. S. 203, 235-236 (1997). This is particularly true in cases of constitutional criminal procedure, where *stare decisis* interests are at their weakest. See *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991).

If some case must fall, it should be *Miranda*. *Miranda* is "poor constitutional law." *Miranda*, *supra*, 384 U. S., at 504 (Harlan, J., dissenting). This decision was literally unprecedented. "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment." *Id.*, at 526 (White, J., dissenting). When this Court first applied the Fifth Amendment to federal custodial interrogation, it relied on a voluntariness test; no special warnings or other procedures were involved. See *Bram* v. *United States*, 168 U. S. 532, 557-558 (1897). Until *Miranda*, all state and federal confessions

were analyzed under the same voluntariness inquiry. *Miranda* was an unanticipated shock to the criminal justice system that would have been disastrous if applied retroactively. See *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966).

Miranda was unprecedented because its essence was based on faulty logic. *Miranda*'s "right of silence," *Miranda*, *supra*, 384 U. S. at 444, is incorrect Fifth Amendment law. "[T]he right, or better the privilege, is against being *compelled* to speak" rather than staying silent. H. Friendly, Benchmarks 271 (1967) (emphasis added). This difference is more than "mere semantics; it goes to the very core of the problem since the privilege exists only when the statement is compelled, the question of waiver is not reached until compulsion has been shown." *Ibid.* The *Miranda* majority leapt over this gap in its logic through its "conclusive presumption" that a person undergoing custodial interrogation " 'cannot be otherwise than under a compulsion to speak.' " See *ibid.* (quoting *Miranda*, 384 U. S., at 467); *supra*, at 5.

The conclusive presumption that compulsion follows from custody is as wrong as it was unprecedented. Before *Miranda*, custody had merely been one factor in determining whether the confession was in fact compelled. See, *e.g.*, *Bram*, *supra*, 168 U. S., at 558. As the *Miranda* majority admitted, the dissents proved, and experience confirmed, unwarned custodial confessions are quite capable of being voluntary. See *supra*, at 6-7. Indeed, voluntariness is the norm for unwarned custodial confessions. The best research available when *Miranda* was decided showed that police interrogation procedures substantially complied with Fifth Amendment and Due Process requirements. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1443-1444 (1985). When *Miranda* was decided, "the law enforcement establishment was engaged in a critical self-examination of its procedures." *Ibid.* *Miranda* cut dead this reform movement, replacing it with a detailed code of procedure based upon an unwarranted presumption of compulsion. "The Court disserves its great role as vindicator of the Bill of Rights when it constructs from plainly inadequate data a generalization refuted by the common experience of mankind." Friendly, *supra*, at 273.

Miranda's greatest flaw is self-admitted; it excludes voluntary confessions. See *supra*, at 6-7. Voluntary confessions are essential to the vital task of detecting and prosecuting crime. See *supra*, at 4. Every lost voluntary confession threatens to free a guilty criminal or force victims to undergo needless, traumatic litigation. Thus even though Ernesto Miranda's confession was obtained "without any force, threats or promises" and was "unmarked by any of the traditional indicia of coercion," see *Miranda*, *supra*, 384 U. S., at 518-519 (Harlan, J., dissenting), the woman he brutalized was forced to endure again the pain and indignity of testifying about the rape, because his voluntary confession was not protected by the *Miranda* talisman.

By unnecessarily limiting custodial interrogation and its final product, voluntary confessions, *Miranda* does a grave and continuing disservice to society. Society has no greater function than to protect its people and their property from crime. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). In its great rush to place suspects on a level playing field with the police, the *Miranda* majority ignored the many nameless victims of crimes not prosecuted and guilty criminals let free because *Miranda* and its progeny prevent the police from obtaining or the courts from utilizing voluntary confessions.

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." *Miranda*, *supra*, 384 U. S., at 542-543 (White, J., dissenting).

The government's claim that *Miranda*'s bright line should be kept because it is easily followed by police and courts, see Brief for United States 31-36, is a tattered fig leaf that fails to cover *Miranda*'s glaring faults. As the government admits, *Miranda* has its difficulties, particularly with regard to custody, and invocation of counsel under *Edwards* v. *Arizona*, 451 U. S. 477 (1981). See Brief for United States 35. Furthermore, *Miranda*'s alternative, the voluntariness standard, is sufficient. Voluntariness was acceptable for the almost 70 years between *Bram* and *Miranda*. The decision declining to apply *Miranda* retroactively referred to the voluntariness standard as having grown "increasingly meticulous through the years." *Johnson*, *supra*, 384 U. S., at 730. Furthermore, many confessions that are excluded from the case-in-chief under *Miranda* currently must still run the voluntariness gauntlet, if the confession is to be used for impeachment or if the defendant seeks to exclude derivative evidence. See, *e.g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 396-398 (1978); J. A. 212. *Miranda*'s minimal convenience does not justify the harm it does to public safety or the Constitution.

As Dean Caplan notes, the *Miranda* majority's emphasis on fairness for the accused at the expense of society's legitimate interest in prosecuting crime is an example of the sporting theory of justice. See Caplan, *supra*, 38 Vand. L. Rev., at 1441-1443. *Miranda*'s gamesmanship has no place in the Constitution. "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U. S. 95, 99 (1927); accord *United States* v. *Ceccolini*, 435 U. S. 268, 279 (1978). Congress's solution is an improvement over *Miranda*, even if it is not the optimum solution.

The rules of *Miranda* and its progeny are not constitutional commands. *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (Kennedy, J., dissenting). If this Court should decide that the choice is really between overruling *Miranda* and striking down § 3501, along with all the cases holding that *Miranda* is not constitutionally required, then *Miranda* should go.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

March, 2000

Respectfully submitted,

EDWIN MEESE III
KENT S. SCHEIDEGGER
Attorney of Record
CHARLES L. HOBSON

Attorneys for Amicus Curiae

Mar 9 2000

(33)

No. 99-5525

Supreme Court, U.S.
FILED
MAR 9 - 2000
CLERK

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR THE COMMUNITY INTEREST; KLAASKIDS FOUNDATION; NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC.; PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, INC.; JUSTICE FOR ALL (TEXAS); JUSTICE FOR ALL (NEW YORK); AND ANTI-VIOLENCE PARTNERSHIP IN SUPPORT OF THE JUDGMENT BELOW

KRISTIN LINSLEY MYLES
KELLY M. KLAUS
AVITAL ZER-ILAN
MUNGER, TOLLES & OLSON LLP
33 New Montgomery Street
San Francisco, CA 94105
(415) 512-4000

DAVID CASTRO
General Counsel
Center for the Community Interest
114 East 32 Street, Suite 604
New York, NY 10016
(212) 689-6080

DANIEL P. COLLINS
Counsel of Record
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae CENTER FOR THE COMMUNITY INTEREST; KLAASKIDS FOUNDATION; NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC.; PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, INC.; JUSTICE FOR ALL (TEXAS); JUSTICE FOR ALL (NEW YORK); AND ANTI-VIOLENCE PARTNERSHIP

39pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

A. The Narrow Question Raised by This Case Is Whether Congress Has the Authority to Displace the Exclusionary Rule That This Court Has Applied to Admissions Obtained in Violation of the Nonconstitutional Prophylactic Rules Set Forth in *Miranda* v. *Arizona* 6

B. Congress Has the Authority to Preclude the Courts from Applying an Exclusionary Rule in the Absence of a Constitutional Violation 9

C. Any Perceived Constitutional Dimension to *Miranda*'s Overbroad Exclusionary Rule Should Be Rejected in Light of the Doubtful Validity of the Rule and Its Substantial and Unjustifiable Social Costs 11

1. The Constitutionally Problematic Nature of the Broad Exclusionary Rule Established in *Miranda* Sharply Undermines Any Perceived Claim to *Stare Decisis* .. 11

2. The Unjustified Societal Costs That Result From *Miranda*'s Exclusionary Rule Provide a Strong Additional Reason for Declining to Invoke *Stare Decisis* to Preserve any Perceived Constitutional Dimension to That Rule 17

TABLE OF CONTENTS
(Continued)

Page

3. The Other *Stare Decisis* Factors Weigh Heavily Against *Miranda*'s Exclusionary Rule 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Anders v. *California*,
386 U.S. 738 (1967) 15

Arizona v. *Roberson*,
486 U.S. 675 (1988) 8, 24

Bank of Nova Scotia v. *United States*,
487 U.S. 250 (1988) 5, 14, 16

Bram v. *United States*,
168 U.S. 532 (1897); 6

Brown v. *Mississippi*,
297 U.S. 278 (1936) 6, 7

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 12

Coleman v. *Thompson*,
501 U.S. 722 (1991) 4, 13

Davis v. *United States*,
512 U.S. 452 (1994) 8, 20

Edwards v. *Arizona*,
451 U.S. 477 (1981) 8, 24, 25

Harris v. *New York*,
401 U.S. 222 (1971) ..... *passim*

Haynes v. *Washington*,
373 U.S. 503 (1963) 6

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 12

TABLE OF AUTHORITIES

Page

Cases

McCleskey v. *Zant*,
499 U.S. 467 (1991) 27

McNeil v. *Wisconsin*,
501 U.S. 171 (1991) 8

Michigan v. *Mosley*,
423 U.S. 96 (1975) 8

Michigan v. *Tucker*,
417 U.S. 433 (1974) ..... *passim*

Miller v. *Fenton*,
474 U.S. 104 (1985) 7

Miranda v. *Arizona*,
384 U.S. 436 (1966) ..... *passim*

Molloy v. *Hogan*,
378 U.S. 1 (1964) 6

Mu'Min v. *Virginia*,
500 U.S. 415 (1991) 4, 15

Murray v. *United States*,
487 U.S. 533 (1988) 14

New York v. *Quarles*,
467 U.S. 649 (1984) ..... *passim*

Oregon v. *Elstad*,
470 U.S. 298 (1985) ..... *passim*

Pacific Mutual v. *Haslip*,
499 U.S. 1 (1991) 17

TABLE OF AUTHORITIES

Page

Cases

Payne v. *Tennessee*,
501 U.S. 808 (1991) 5, 17, 28

People v. *Braeseke*,
25 Cal. 3d 691, 602 P.2d 384 (1979),
vacated, 446 U.S. 932, *judgment reinstated*,
28 Cal. 3d 86, 618 P.2d 149 (1980),
cert. denied, 451 U.S. 1021 (1981) 26

Planned Parenthood of Southeastern Penn. v.
Casey, 505 U.S. 833 (1992); 17, 28, 29

Smith v. *Robbins*,
120 S. Ct. 746 (2000) 4, 15, 16

State v. *Hoeplinger*,
206 Conn. 278, 537 A.2d 1010 (1988) 25

State v. *Hoeplinger*,
27 Conn. App. 643, 609 A.2d 1015 (1992) 26

State v. *Oldham*,
618 S.W.2d 647 (Mo. 1981) 26

State v. *Rodriguez*,
186 Ariz. 240 (1996) 25

State v. *Rodriguez*,
192 Ariz. 58, 961 P.2d 1006 (1998) 25

Stewart Org. v. *Ricoh Corp.*,
487 U.S. 22 (1988) 10

United States v. *Carignan*,
342 U.S. 36 (1951) 6

United States v. *Title Insurance & Trust Co.*,
265 U.S. 472 (1924) 28

TABLE OF AUTHORITIES

Page

Cases

Vance v. *Terrazas*,
444 U.S. 252 (1980) 3, 9

Withrow v. *Williams*,
507 U.S. 680 (1993) 7

Wolman v. *Walter*,
433 U.S. 229 (1977) 17

Statutes and Rules

18 U.S.C. § 3501 ..... *passim*

Supreme Court Rule 37 1

Law Review Articles

P. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*,
90 NW. U.L. REV. 1084 (1996) 18, 19

P. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*,
20 HARV. J.L. & PUB. POLICY 327 (1997) 19

P. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*,
90 NW. U.L. REV. 387 (1996) 18, 19, 20, 21, 22

P. Cassell & R. Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*,
50 STAN. L. REV. 1181 (1998) 18

TABLE OF AUTHORITIES

Page

Law Review Articles

P. Cassell & R. Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*,
50 STAN. L. REV. 1055 (1998) 18

P. Cassell & B. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda,
43 U.C.L.A. L. REV. 839 (1996) 18, 22, 24

D. Collins, *Farewell* Miranda*?*,
1995 PUB. INT. L. REV. 185 22

J. Donohue, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) 19

L. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*,
48 CATH. U.L. REV. 727 (1999) 16

P. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 20

P. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*,
1987 U. Ill. L. Rev. 223 23

S. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500 (1996) 19, 23

S. Schulhofer, *Reconsidering* Miranda,
54 U. CHI. L. REV. 435 (1987) 13

C. Weisselberg, *Saving* Miranda,
84 CORNELL L. REV. 109 (1998) 16

TABLE OF AUTHORITIES

Page

Miscellaneous

Atkins & P. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*(1998) (available at <http://papers.ssrn.com/paper.taf?ABSTRACT_ID=140992>) 18

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1992 21

Dept. of Justice Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation, reprinted in* 22 U. MICH. J.L. REFORM 437 (1989) 27

F. FEENEY, ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY(1983) 20, 23

"No Verdict in Third Mutilation-Murder Trial," A.P. State & Local Wire (June 9, 1999) 25

STATISTICAL ABSTRACT OF THE UNITED STATES (1999) 21

Pursuant to this Court's Rule 37.3, *amici curiae* Center for the Community Interest; KlaasKids Foundation; National Organization of Parents of Murdered Children, Inc.; Parents of Murdered Children of New York State, Inc.; Justice For All (Texas); Justice for All (New York); and Anti-Violence Partnership respectfully submit this brief urging this Court to affirm the judgment of the United States Court of Appeals for the Fourth Circuit and to hold that 18 U.S.C. § 3501 prohibits a federal court from excluding a voluntary confession on the ground that it was taken in violation of the prophylactic warning requirements set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).[1]

INTEREST OF *AMICI CURIAE*

The Center for the Community Interest ("CCI") is a national non-profit public interest organization founded to provide a voice for localities and community groups on public safety and quality-of-life issues. CCI helps cities, states, and civic associations to develop and defend policies that strike a reasonable balance between the rights of the individual and the needs of the larger community, addressing issues such as school violence, injunctions to control gangs, drug-related crime in low-income housing, and restrictions on aggressive panhandling. CCI has developed a nationally recognized expertise on legal issues affecting the safety and quality of life of communities. CCI has participated in a wide range of public safety and quality-of-life cases before this Court and other courts throughout the country. In addition, it has represented crime victims' groups in helping to sustain "Megan's Law" in the Second Circuit and, in the Fifth Circuit, the right of crime victims

---

[1] This brief is filed with the consent of both petitioner and respondent, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

to communicate with parole boards. CCI is extremely concerned about the harms caused to crime victims and their families when criminals may escape justice because confessions that are constitutionally voluntary are excluded as a result of violations of the prophylactic rules of *Miranda* v. *Arizona*. CCI believes that the statute challenged here, 18 U.S.C. § 3501, would protect against these harms without disparaging Fifth Amendment rights.

CCI is joined by six other amici on the brief. The KlaasKids Foundation for Children is a national non-profit group that is in the forefront of advocating child safety through education and public awareness programs. Mr. Klaas founded the group after the murder of his 12-year-old daughter, Polly, by a parolee. The National Organization of Parents of Murdered Children, Inc. provides emotional support to families and friends of homicide victims. Its programs include Parole Block, which has successfully campaigned to keep convicted murderers behind bars. The Anti-Violence Partnership is a non-profit organization that addresses violence in Philadelphia through victim services, crime prevention, and programs such as Families of Murder Victims and the Student Anti-Violence Education Program. Justice for All of New York and of Texas are two separate non-profit organizations, each dedicated to the support and promotion of crime prevention and public safety bills and the broadening of legal rights for the victims of sexual and violent crimes. Parents of Murdered Children of New York State is a non-profit organization formed in 1983 by the parents of murder victims to protect the rights of victims of violent crimes. As advocates for the victims of violent crime, the six co-amici organizations share CCI's grave concerns about the implications of invalidating § 3501.

SUMMARY OF ARGUMENT

The parties' analysis of 18 U.S.C. § 3501 is based on a fundamental misreading of the statute. Because § 3501 does not contain any language that can be read to alter or

abolish *Miranda*'s prophylactic warning requirements, police officers must continue to abide by them. The statute merely alters the analysis that *courts* must apply *ex post*: A confession will be admissible if it is "voluntarily given." 18 U.S.C. § 3501(a). The statute prevents courts from applying the exclusionary rule unless an *actual* violation of the Constitution has occurred. Thus, the rule is eliminated *only* in those instances where the "*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself." *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985).

It is one of "the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts," subject only to the constraints of the Constitution. *Vance* v. *Terrazas*, 444 U.S. 252, 265 (1980). As the Court of Appeals in this case correctly concluded, the issue is whether the breadth of the exclusionary rule set forth in *Miranda* "is required by the Constitution." J.A. 166. This Court's cases clearly establish that it is not. "The Fifth Amendment prohibits use by the prosecution in its case in chief *only* of *compelled* testimony." *Elstad*, 470 U.S. at 306-07 (first emphasis added). The *Miranda* exclusionary rule, however, unquestionably operates to bar statements that are not in fact compelled. Indeed, this Court has repeatedly drawn a sharp distinction between the ultimate constitutional standard—voluntariness—and the prophylactic rules of *Miranda*. *See Elstad*, 470 U.S. at 318; *New York* v. *Quarles*, 467 U.S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 445-46 (1974); *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

The parties contend that *Miranda* rests on the sort of "constitutional basis" that precludes Congress from modifying it, and that principles of *stare decisis* dictate that this purported "constitutional" limitation should be preserved. U.S. Br. at 23; *see also* Petr. Br. at 22-27. The parties' position is itself at war with principles of *stare decisis*.

The straightforward constitutionalization of *Miranda* urged by Petitioner is flatly inconsistent with numerous

decisions of this Court, which have, for 30 years, unambiguously and emphatically rejected the view that *Miranda*'s prophylactic rules are required by the Constitution. *Elstad*; *Quarles; Tucker*; *Harris*. Similarly, *Miranda* cannot be recast merely as establishing a set of doctrinal presumptions that the Court applied in order to simplify the adjudication of Fifth Amendment issues; this view directly conflicts with this Court's longstanding limitations on the use of such presumptions, *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991), and *Miranda* simply cannot be understood as a jurisprudential labor-saving device. Nor can § 3501 be invalidated on the ground that *Miranda* should be viewed as reflecting a constitutional holding that *some* sort of prophylactic safeguards must be put in place at the police station house. U.S. Br. at 26-29. This argument addresses the wrong element of *Miranda*. There is no inconsistency between reaffirming that the warnings must still be given and upholding § 3501's mandate to federal courts to apply the drastic remedy of exclusion only when an actual violation of the Constitution has occurred. Moreover, there is simply no basis for concluding that an unyielding, inflexible exclusionary rule is an *indispensable* element of a constitutionally adequate prophylactic regime.

The Government contends that upholding § 3501 would be inconsistent with this Court's repeated application of the full measure of that rule in state cases. The Government is almost certainly correct that the Court's practice in state cases brings *Miranda* into conflict with this Court's repeated insistence that it lacks "supervisory authority" over state courts and cannot reverse state court judgments unless they actually conflict with the "commands of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). The practice is also inconsistent with the Court's treatment of prophylactic rules in other contexts. *Smith* v. *Robbins*, 120 S. Ct. 746, 756-57 (2000). The tension between *Miranda*'s excessive exclusionary rule and the Court's abjuration of a supervisory power over state courts suggests that, in an appropriate state case, the Court

will need to resolve this tension either by eliminating the overbreadth of *Miranda*'s exclusionary rule in state cases or by adhering to its exercise of an apparent supervisory power in this one area of the law. But this case arises in federal court, and this Court has consistently held that its exercise of supervisory power may not be invoked to disregard the commands of a congressional statute. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988).

At a minimum, it is apparent that any conceivable reading of *Miranda* that would invalidate § 3501 would place that decision squarely in conflict with another line of this Court's jurisprudence. The Court thus cannot simply fall back on *stare decisis*, but must instead decide this case correctly on its own merits.

An additional important factor in determining whether to invoke *stare decisis* is whether the challenged rule has imposed significant harms that outweigh the perceived benefits. *Payne* v. *Tennessee*, 501 U.S. 808, 827-30 (1991). This additional factor weighs strongly in favor of upholding § 3501. One obvious cost of *Miranda*'s overbroad exclusionary rule is that, by excluding voluntary and reliable confessions, the rule unjustifiably increases the risks that criminals will not be punished. Even considering all of the limitations in the available empirical evidence, it is clear that *Miranda*'s overbroad rule excludes voluntary confessions in thousands of cases each year; that many of these cases are dismissed as a consequence; and that there are adverse effects on the disposition of many of the remaining cases. Numbers, however, do not tell the whole story. One must not lose sight of the fact that these "small" percentages conceal individual injustices. Because § 3501 requires exclusion of involuntary confessions, it does not result in the injustice of imprisoning the innocent. However, it is deeply offensive that, without sufficient reason, *Miranda*'s exclusionary rule permits the guilty to escape justice.

ARGUMENT

A. The Narrow Question Raised by This Case Is Whether Congress Has the Authority to Displace the Exclusionary Rule That This Court Has Applied to Admissions Obtained in Violation of the Nonconstitutional Prophylactic Rules Set Forth in *Miranda* v. *Arizona*

The Government's attack on § 3501 is premised on the view that the statute effects "a return to a totality-of-the-circumstances [voluntariness] test *in all settings*." U.S. Br. 36 (emphasis added). Petitioner's argument rests on the same assumption. Petr.'s Br. 28-29. This central premise of the parties, however, is based on a patent misreading of the statute. As set forth below, nothing in § 3501 purports to alter the prophylactic rules that this Court has imposed upon police officers to guard against violations of Fifth Amendment rights; the familiar *Miranda* warnings must still be given. Rather, the only effect of § 3501 is to prevent courts from applying the exclusionary rule unless an *actual* violation of the Constitution has occurred.

Prior to *Miranda*, this Court held that, in federal cases, both the Self-Incrimination Clause and the Due Process Clause of the Fifth Amendment prohibited the Government from admitting an involuntarily obtained confession into evidence against a criminal defendant for any purpose. *See Bram* v. *United States*, 168 U.S. 532, 543-44, 557-58 (1897) (applying Self-Incrimination Clause in federal case); *United States* v. *Carignan*, 342 U.S. 36, 38 (1951). Similarly, even prior to this Court's decision in *Molloy* v. *Hogan*, 378 U.S. 1 (1964)—which first recognized the applicability of the Self-Incrimination Clause in state cases—this Court had held that the Due Process Clause of the Fourteenth Amendment precluded the States from using coerced confessions in criminal cases. *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963); *Brown* v. *Mississippi*, 297 U.S. 278, 285-86 (1936). The Court's decision in *Molloy* "opened *Bram*'s doctrinal avenue for the analysis of state cases," and therefore, after

Molloy, the Self-Incrimination Clause would also apply to bar the admission of a coerced confession in a *state* case. *Withrow* v. *Williams*, 507 U.S. 680, 688-89 (1993). Thus, prior to *Miranda*, both the Self-Incrimination Clause and the Due Process Clauses established the same test for *admissibility of confessions in court*: A confession is admissible if, under all the circumstances, it is voluntarily given.

Before *Miranda*, however, the two Clauses did *not* both apply at the police station house. The Court had long held that the Due Process Clause is violated, not merely by the *admission* of a coerced statement into evidence, but also by the police's act of forcing the suspect to give the statement in the first place. *See Brown*, 297 U.S. at 286 (holding that the Due Process Clause prohibited the "methods . . . taken to procure the confessions"); *see also Miller* v. *Fenton*, 474 U.S. 104, 109 (1985). By contrast, prior to the decision in *Miranda*, this Court had never held that the *Self-Incrimination Clause* imposed any limits on the conduct of police interrogation itself. *See New York* v. *Quarles*, 467 U.S. 649, 654 (1984). *Miranda*'s central innovation was its establishment, under the aegis of the Self-Incrimination Clause, of a set of bright-line procedural rules for the conduct of interrogations by police officers at the station house.

In imposing these rules, *Miranda* sought to fashion a set of "safeguards" that would protect an in-custody suspect's Fifth Amendment right to remain silent. 384 U.S. at 467. In doing so, the *Miranda* Court was not content merely to rely upon the admonition that police officers should not "coerce" confessions: Although voluntariness was the ultimate constitutional touchstone, that standard—at least from the *ex ante* point of view of the officer in the station house—does not provide any clear, bright-line rules concerning the permissible limits of interrogation. *Withrow*, 507 U.S. at 694 ("*Miranda*'s 'core virtue' was 'afford[ing] police and courts clear guidance on *the manner in which to conduct a custodial investigation*'") (citations omitted) (emphasis added). In part because of that concern, the

Court set forth certain *per se* rules that—in the absence of an equally effective alternative set of procedural safeguards—"must be observed." 384 U.S. at 467.

Specifically, the Court held that, prior to custodial interrogation, a police officer must advise the suspect (1) "that he has the right to remain silent"; (2) "that anything said can and will be used against the individual in court"; (3) "that he has the right to consult with a lawyer and to have the lawyer with him during interrogation"; and (4) "that if he is indigent a lawyer will be appointed to represent him." *Miranda*, 384 U.S. at 468, 469, 471, 473. If the suspect clearly invokes his right to an attorney under *Miranda*, then (assuming no break in custody) he may not be approached for further questioning regarding any offense unless counsel is present. *McNeil* v. *Wisconsin*, 501 U.S. 171, 176-77 (1991); *Arizona* v. *Roberson*, 486 U.S. 675, 682 (1988); *Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981). An equivocal request for counsel, however, does not trigger these additional requirements. *Davis* v. *United States*, 512 U.S. 452, 459-62 (1994). On the other hand, if the suspect does not request an attorney, but instead invokes his *Miranda* right to remain silent, the suspect may later be questioned about other offenses. *Roberson*, 486 U.S. at 683; *Michigan* v. *Mosley*, 423 U.S. 96, 103-06 (1975).

The Court in *Miranda* expressly acknowledged that these specific procedural "safeguards" were *not* required by the Constitution. 384 U.S. at 467. Nonetheless, the Court sought to enforce these safeguards by adopting an across-the-board exclusionary rule that bars, with limited exceptions, the admission of any statement taken in violation of those prophylactic rules. The result is that the "*Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." *Oregon* v. *Elstad*, 470 U.S. 298, 306 (1985).

Viewed against this backdrop, the effect of § 3501 is clear from the language of the statute. First, because

§ 3501, by its plain terms, addresses only the subject of the admissibility of confessions *in court*, there simply is no basis for concluding that the statute alters the various requirements that *Miranda* and its progeny impose upon police officers who conduct custodial interrogations. Those obligations remain unaltered by the statute, and police officers must continue to abide by them. Second, although the statute does not alter the prophylactic rules established in *Miranda* to ensure, *ex ante*, against possible violations of the Fifth Amendment, the statute does alter the analysis that *courts* must apply *ex post*: Under the statute, a confession will be admissible if it is "voluntarily given." 18 U.S.C. § 3501(a). Thus, the effect of the statute is to eliminate the application of the exclusionary rule in those instances—and *only* those instances—where the *"Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself." *Elstad*, 470 U.S. at 306.

The issue raised by § 3501 is thus substantially narrower than suggested by the parties. The question whether the *Miranda* Court had the constitutional authority in the first instance to set forth specific guidelines governing police custodial interrogation is an important one, but that issue is not squarely presented by this case. Nothing in the statute purports to alter these requirements. Rather, the only question posed by § 3501 is the narrow one of whether Congress has the authority to limit the courts to applying an exclusionary rule only in those instances that involve an *actual* violation of the Fifth Amendment. As set forth below, Congress has that authority.

B. Congress Has the Authority to Preclude the Courts from Applying an Exclusionary Rule in the Absence of a Constitutional Violation

It is one of "the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts." *Vance* v. *Terrazas*, 444 U.S. 252, 265 (1980). Like any congressional power, it is subject to the constraints of the Constitution. But unless the rule estab-

lished by Congress is *forbidden* by the Constitution, the choice is Congress's to make. *Stewart Org.* v. *Ricoh Corp.*, 487 U.S. 22, 31-32 (1988). As the Court of Appeals in this case correctly concluded, the issue is thus whether the breadth of the exclusionary rule set forth in *Miranda* "is required by the Constitution." J.A. 166. This Court's cases clearly establish that the answer to this question is "No."

"The Fifth Amendment prohibits use by the prosecution in its case in chief *only* of *compelled* testimony." *Elstad*, 470 U.S. at 306-07 (first emphasis added). The *Miranda* exclusionary rule, however, unquestionably operates to bar statements that are not in fact compelled: As this Court has squarely held, the *Miranda* rule "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." *Id.* at 306. Indeed, this Court has repeatedly drawn a sharp distinction between the ultimate constitutional standard—voluntariness—and the prophylactic rules of *Miranda*. Thus, for example, in recognizing a "public safety" exception to the *Miranda* warning requirements, this Court in *Quarles* specifically noted that there was "no claim that [Quarles's] statements were *actually compelled* by police conduct which overcame his will to resist." 467 U.S. at 654 (emphasis added). Similarly, in recognizing that statements taken in violation of *Miranda* may nonetheless be used for purposes of impeachment, this Court in *Harris* v. *New York*, 401 U.S. 222 (1971), was careful to note that Harris "makes no claim that the statements made to the police were coerced or involuntary." *Id.* at 224. In *Elstad*, the Court held that a "suspect who has once responded to unwarned yet *uncoercive* questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 470 U.S. at 318 (emphasis added). *See also Michigan* v. *Tucker*, 417 U.S. 433, 445-46 (1974) ("[W]e have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in

Miranda to safeguard that privilege.").

As explained earlier, § 3501 alters the law only in those instances in which a confession is taken in violation of *Miranda*'s prophylactic rules but is nonetheless—as in *Elstad*, *Quarles*, *Tucker*, and *Harris*—not involuntary in the constitutional sense. Thus, the statute merely prohibits exclusion in precisely those instances in which no violation of the Constitution actually occurred. Because § 3501 does not purport to require the admission of any confession that the Constitution *requires* to be suppressed, it is constitutional. The court below correctly applied this reasoning in upholding the statute. *See* J.A. 207-11.

C. Any Perceived Constitutional Dimension to *Miranda*'s Overbroad Exclusionary Rule Should Be Rejected in Light of the Doubtful Validity of the Rule and Its Substantial and Unjustifiable Social Costs

1. The Constitutionally Problematic Nature of the Broad Exclusionary Rule Established in *Miranda* Sharply Undermines Any Perceived Claim to *Stare Decisis*

Despite this Court's repeated holdings that a violation of *Miranda* is not itself a violation of the Constitution, Petitioner and the Government both contend that *Miranda* rests on the sort of "constitutional basis" that precludes Congress from modifying it, and that principles of *stare decisis* dictate that this purported "constitutional" limitation should be preserved. U.S. Br. at 23; *see also* Petr. Br. at 22-27. Both parties are wrong. The central defect in the parties' arguments is that they fail to identify clearly the power that the *Miranda* Court purported to exercise; the parties largely assume that, whatever authority the Court was exercising, it was one that would trump any effort by Congress to modify *Miranda*'s exclusionary regime. Closer examination of the various possible bases for *Miranda* makes clear that the broad sweep of *Miranda*'s exclusionary

rule is not immune from the sort of limited congressional modification contained in § 3501. Indeed, the parties' contrary position is itself inconsistent with a substantial body of precedent in this Court.

Petitioner (but not the Government) urges the ambitious view that "*Miranda* represents the Court's interpretation of the Constitution" and that the rules set forth in *Miranda*, despite their "prophylactic" character, are therefore "constitutionally required." Petr. Br. at 25, 29. If the apparent premise of this argument were correct, § 3501 would indeed be unconstitutional: If the Court in *Miranda* had purported to define the substantive contours of what the Fifth Amendment actually requires, there would be no doubt that Congress would be powerless to modify *Miranda*'s exclusionary rule. *See City of Boerne* v. *Flores*, 521 U.S. 507, 519-20 (1997); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But Petitioner's premise is not correct. Despite some language in *Miranda* that might have supported this view, the Court has, for 30 years, unambiguously rejected the view that *Miranda*'s prophylactic rules represent the requirements of the Constitution itself. *Michigan* v. *Tucker*, 417 U.S. at 444 (*Miranda* rights are "not themselves rights protected by the Constitution"); *see also Elstad*, 470 U.S. at 306-08; *Quarles*, 467 U.S. at 654; *Harris*, 401 U.S. at 224-25. Accordingly, Petitioner's attempt to elevate *Miranda* to the status of an ordinary constitutional decision would, at this late date, require the overruling of *Harris*, *Tucker*, *Quarles*, and *Elstad*: Each of these decisions is premised critically on the view that the full breadth of *Miranda*'s exclusionary rule is *not* constitutionally required. The doctrine of *stare decisis* thus obviously cannot be invoked in support of Petitioner's straightforward constitutionalization of *Miranda*.

An alternative view would be to read *Miranda* as merely establishing a set of doctrinal presumptions that the Court applied in order to simplify the adjudication of Fifth Amendment issues. Although this position has been

endorsed in academic commentary, *see, e.g.*, S. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 448-52 (1987), neither Petitioner, the Government, nor their many *amici* unambiguously endorses this position. It is not difficult to see why. If *Miranda* were construed as merely establishing certain doctrinal aids to adjudication, it would come into direct conflict with this Court's longstanding limitations on the use of such presumptions. A conclusive presumption "is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases"; accordingly, a mandatory presumption should not be employed if "the generalization is incorrect as an empirical matter." *Coleman* v. *Thompson*, 501 U.S. 722, 737 (1991). There is no support whatsoever for the view that "almost all" un-*Mirandized* statements are actually involuntary; in fact, as this Court's own cases suggest, quite the opposite is true.

Moreover, whatever else may be said about *Miranda*, it simply cannot be understood as a jurisprudential labor-saving device. As this Court made clear in *Elstad*, the presumption of compulsion that arises from the failure to follow *Miranda* is irrebuttable *only* for purposes of the government's case-in-chief; a statement taken in violation of *Miranda* may be used for impeachment if it is voluntarily given. *Elstad*, 470 U.S. at 307-08. One must not lose sight of the fact that what occurs when a criminal defendant files a motion to suppress on *Miranda* grounds is that the district court ultimately makes *two* inquiries *in each and every case*: (1) the court must decide whether *Miranda* was violated, thereby requiring suppression in the government's case-in-chief, and (2) the court must also decide whether the statement may be used for impeachment by determining whether, under the traditional "totality of the circumstances" test, the statement is voluntary. So long as two different standards govern whether a statement may be used in the case-in-chief and whether it may be used for impeachment, the *Miranda* regime *doubles* the work that trial courts must do. *Miranda* thus could be justified as a

labor-saving device only if *Harris* were overruled—a result that would have catastrophic results for the integrity of the criminal justice system by distorting the truth-finding process in a manner that would be gravely unjust to victims of crime. Under § 3501, by contrast, trial courts need only make a single inquiry (and one that they already make anyway): whether the confession was voluntary.

A third approach, which is apparently the one advocated by the Government, would be to view *Miranda* as reflecting a constitutional holding that *some* sort of prophylactic safeguards must be put in place at the police station house in order to avoid violations of the Fifth Amendment. U.S. Br. at 26-29. There are several problems with this argument. For one thing, it addresses the wrong element of the *Miranda* regime. Nothing in § 3501 dispenses with the warning requirement or other prophylactic safeguards at all. The question whether the Court had the constitutional authority, in the first instance, to prescribe a framework of prophylactic rules for the conduct of police interrogation is a different question from whether the Constitution *requires* the exclusion of evidence taken in violation of those rules. It clearly does not, as this Court's own judicially created exceptions to *Miranda*'s exclusionary rule illustrate. Moreover, there is no basis for concluding that an unyielding, inflexible exclusionary rule is an *indispensable* element of a constitutionally adequate prophylactic regime. In virtually every other area of the law, suppression is not ordered when the harm to be avoided did not materialize: A patent Fourth Amendment violation, for example, will not result in suppression if the evidence would inevitably have been discovered. *Murray* v. *United States*, 487 U.S. 533, 539-40 (1988). Indeed, Congress has the power to require the courts to adhere to the principle of "harmless error," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-55 (1988), and it is inconsistent with that principle to insist that *Miranda*'s prophylactic rules must be *over*enforced and that exclusion must be ordered even when the harm sought to be avoided did not occur.

The Government contends that upholding Congress's power to modify *Miranda*'s broad exclusionary rule would be inconsistent with this Court's repeated application of the full measure of that rule in state cases. This argument seeks to convert *Miranda*'s greatest weakness into its greatest strength. As the *Miranda* case law now stands, the Court unquestionably has exercised a power to reverse state court judgments even in the absence of an *actual* violation of the Constitution, and it has done so largely through the device of using the *Miranda* rules to "deem" there to have been a constitutional violation even when, applying *Harris*, the courts have properly determined that there wasn't one. The Government is almost certainly correct that this practice brings *Miranda* into conflict with this Court's repeated insistence that it lacks "supervisory authority" over state courts and cannot reverse state court judgments unless they actually conflict with the "*commands* of the United States Constitution." *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991) (emphasis added).

The practice is also inconsistent with the Court's treatment of the prophylactic rules it has created in other contexts. For example, in *Smith* v. *Robbins*, 120 S. Ct. 746, 757 (2000), this Court recently addressed the "prophylactic framework" that was set forth in *Anders* v. *California*, 386 U.S. 738 (1967), for evaluating a request of appellate counsel to withdraw, or to dispense with merits briefs, on the grounds that an appeal would be frivolous. *Anders* held that, "in order to protect indigent defendants' constitutional right to appellate counsel, courts must safeguard against the risk of granting such requests in cases where the appeal is not actually frivolous." *Id.* at 752-53. In *Smith*, this Court ruled that the particular procedure set forth in *Anders* was not "obligatory upon the States" and that, in assessing whether a particular State's alternative procedure was sufficient, courts must "focus on the underlying goals that the procedure should serve." *Id.* at 756, 760. The uncritical and inflexible application of *Miranda*'s exclusionary rule in state cases is inconsistent with these

principles: By requiring suppression even in the absence of an actual violation of constitutional rights, *Miranda*'s unusual exclusionary rule goes well beyond the "underlying goals" that the decision seeks to serve and vastly exceeds "the minimum requirements of the Fourteenth Amendment" that constitute the sole limit to the "wide discretion" of the States. *Smith*, 120 S. Ct. at 757, 760.

The tension between *Miranda*'s excessive exclusionary rule and the Court's abjuration of a supervisory power over state courts suggests that, in an appropriate state case, the Court will need to resolve this tension either by eliminating the overbreadth of *Miranda*'s exclusionary rule in state cases or by adhering to its exercise of an apparent supervisory power in this one area of the law. But this case arises in federal court, and that makes it much easier to resolve. Even if the extreme breadth of *Miranda*'s exclusionary rule is conceded to rest, in part, on an exercise of supervisory authority, that raises less difficulty, because this Court *has* supervisory power in federal cases. However, that recognition is fatal to the Government's position, because this Court has consistently held that supervisory power may not be invoked to disregard the commands of a congressional statute. *Bank of Nova Scotia*, 487 U.S. at 254.

At a minimum, it is apparent that any conceivable reading of *Miranda* that would invalidate § 3501 would place *Miranda* squarely in conflict with another line of this Court's jurisprudence. Several of *Miranda*'s defenders have candidly conceded this point, and—in contrast to the evasiveness of the Government here—have forthrightly called for a "reconstitutionalization" of *Miranda* and the limiting or overruling of *Harris*, *Tucker*, *Quarles*, and *Elstad*. *See, e.g.*, C. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998); L. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U.L. REV. 727 (1999). Because the constitutional legitimacy of *Miranda*'s overbroad exclusionary rule is a matter on which, at best, this Court's decisions are in tension with one another,

the Court cannot simply fall back on *stare decisis*, but must instead decide this case correctly on its own merits. *Planned Parenthood of Southeastern Penn.* v. *Casey*, 505 U.S. 833 (1992) (Opin. of O'Connor, Kennedy, & Souter, JJ.) (rejecting the trimester framework of *Roe* v. *Wade*, 410 U.S. 113 (1973), because that aspect of the decision was in tension with other aspects of *Roe* and with other abortion cases); *Pacific Mutual* v. *Haslip*, 499 U.S. 1, 37-38 (1991) (Scalia, J., concurring) ("Our holdings remain in conflict, no matter which course I take."); *Wolman* v. *Walter*, 433 U.S. 229, 266 n.2 (1977) (Stevens, J., concurring in part and dissenting in part) ("In view of the acknowledged tension [between two decisions] the doctrine of *stare decisis* cannot foreclose an eventual choice between two inconsistent precedents."). The correct decision, as stated earlier, is to uphold § 3501.

2. The Unjustified Societal Costs That Result From *Miranda*'s Exclusionary Rule Provide a Strong Additional Reason for Declining to Invoke *Stare Decisis* to Preserve any Perceived Constitutional Dimension to That Rule

The inherently unsettled status of *Miranda*'s exclusionary rule is not the only reason for concluding that *stare decisis* provides no obstacle to Congress's limited modification of that rule in § 3501. Assuming that *stare decisis* has some perceived force here, an additional important factor is whether the challenged rule has imposed significant harms that outweigh the perceived benefits of the decision. *Payne* v. *Tennessee*, 501 U.S. 808, 827-30 (1991). This consideration has special force here, because this Court has emphasized that the scope of *Miranda*'s exclusionary rule must be drawn in a manner that takes account of its substantial costs. *Elstad*, 470 U.S. at 312. This additional factor weighs very strongly against invalidating § 3501.

There is a substantial body of evidence that strongly suggests that *Miranda* has imposed certain heavy costs on the criminal justice system and the Nation as a whole. In

particular, Professor Cassell has analyzed the available data, conducted his own independent research, and concluded that the *Miranda* regime has reduced the rate at which suspects confess and has resulted in a substantial increase in the number of unsolved crimes. *See* P. Cassell & R. Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1059 (1998) ("[C]rime clearance rates fell precipitously immediately after *Miranda* and have remained at lower levels ever since."); P. Cassell & R. Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998); P. Cassell & B. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 U.C.L.A. L. REV. 839, 842 (1996) (reporting conclusions of study in Salt Lake City) ("The 33% confession rate we found is lower than the rates reported in studies done before *Miranda* and conducted in countries that do not follow the *Miranda* requirements, suggesting that *Miranda* has reduced the confession rate."); P. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387, 391 (1996) ("[The evidence] suggests that each year *Miranda* results in 'lost cases' against roughly 28,000 serious violent offenders and 79,000 property offenders and produces plea bargains to reduced charges in almost the same number of cases."); P. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U.L. REV. 1084, 1085 (1996) ("*Miranda* causes the loss of roughly 3.8% of all criminal cases each year and about an equal number of more lenient plea bargains . . . ."); *cf.* R. Atkins & P. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule* 22 (1998) (available at <http://papers.ssrn.com/paper.taf?ABSTRACT_ID=140992>) ("[T]he Supreme Court may have increased total crime

rates by 11% with its *Miranda* ruling.").[2]

Most of these studies have attributed the harms caused by *Miranda* to the warning requirement itself, rather than to the exclusionary rule. *See, e.g.*, Cassell, *supra*, 90 NW. U. L. REV. at 392-94. The Government seizes upon this fact to argue that, unless § 3501 is construed to eliminate the warning requirement, the statute cannot ameliorate the adverse effects of the decision. U.S. Br. at 32 n.23. The Government's position overlooks a second harm from the *Miranda* regime, apart from the reduced ability of police to obtain confessions in the first place. Specifically, *Miranda*'s overbroad exclusionary rule unjustifiably increases the risks that criminals will escape justice. As Justice White

---

[2] Because *Miranda* has been the law of the land in all 50 States since 1966, it simply has not been possible to perform a rigorous statistical comparison using an American control group in which *Miranda* does not apply; the points of comparison must necessarily be with foreign jurisdictions or with American jurisdictions in an earlier day and age. Some defenders of *Miranda* have been quick to use this fact to take issue with certain of Professor Cassell's methods and conclusions. *See, e.g.*, S. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500, 502 (1996). Professor Cassell's extensive rejoinder to Professor Schulhofer's article concludes that "Schulhofer indulges every presumption against harm from *Miranda*" and applies a "one-sided methodology." Cassell, *supra*, 90 NW. U.L. REV. at 1086. Prof. Cassell has also noted that one of the principal studies upon which Prof. Schulhofer relies has since been shown to have been deeply flawed in its data collection. P. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POLICY 327, 330-32 (1997). Moreover, the view that *Miranda*'s costs have been dissipated by police resourcefulness in adapting to the decision, Schulhofer, *supra*, 90 NW. U.L. REV. at 507-10, is fallacious: It would be akin to saying that, if firefighters get very good at fighting blazes, fire should be deemed to cause only "vanishingly small" costs, and we should not be concerned about deliberately setting them. *Cf.* J. Donohue, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1150-51 (1998) (noting that this argument "implies that the real cost of *Miranda* likely is a resource cost"; if the greater efforts needed to solve crimes under *Miranda* were on the order of $4 billion, "then *Miranda* annually costs $4 billion," even if crime rates do not increase).

observed in his *Miranda* dissent, "[i]n some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." 384 U.S. at 542 (White, J., dissenting); *see also Davis*, 512 U.S. at 465 (Scalia, J., concurring) (noting that *Miranda*'s exclusionary rule may have produced "the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens").

The academic commentary, even from *Miranda*'s detractors, has been largely dismissive of this concern, concluding that the release of criminals due to a *Miranda*-based suppression order is "quite rare." P. Cassell, *supra*, 90 NW. U. L. REV. at 392. The prevailing dismissive view is based on studies which indicate that the rate at which prosecutions fail because of *Miranda*'s suppression rule is probably not greater than about 0.3% of cases. *See id.* at 392 & n.17 (data from study of San Diego and Jacksonville arrests for burglary and robbery indicate that at most 0.3% of cases "could be said to have been dropped because of *Miranda* problems with the confession") (citing F. FEENEY, ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 144 (1983)). The Feeney study on which this number is based included, not just cases in which motions to suppress were filed, but also cases in which the prosecution dropped the case without the need for a formal motion. *Id.*[3] For several reasons, these studies do not show that *Miranda*'s exclusionary rule is "cost free."

Even assuming that the numbers calculated in these

[3] That perhaps explains why the dismissal rate found in this study is almost four times higher than the dismissal rate in a study that focused only on cases in which formal motions were actually filed. *See* P. Cassell, *supra*, 90 NW. U. L. REV. at 392 (citing P. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 601 (concluding that suppression orders led to dismissals in 0.071% of cases)).

studies are accurate, the relatively small percentage numbers conceal a significant amount of crime. If one extrapolates these rates across the entire criminal justice system, the numbers are substantial. There were 259,500 arrests for burglary in the United States in 1997, and even if only 0.3% of those cases were dropped because of *Miranda*'s exclusionary rule, that would still amount to almost 779 cases per year. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 222 (1999). If the same 0.3% rate applies for more serious crimes such as aggravated assault, robbery, or murder, that would translate into more than 1500 violent-crime cases that would have been dropped *in a single year* because of the *Miranda* decision (1210 assault cases, 356 robbery cases, and 42 murder cases). *Id.*[4] Indeed, about 15% of prosecutor's offices in any given year report experiencing dismissals of cases based on *Miranda* problems. *See* Cassell, *supra*, 90 NW. U.L. REV. at 393 & n.18 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1992, at 6 (1993)). Thus, the supposedly "small" percentage of *Miranda*-based dismissals suggests that there are thousands of victims of crime who are denied justice each year in the United States because of *Miranda*'s overbroad exclusionary rule. The point can be vividly made by considering another seemingly "small" percentage: Approximately 0.3% of all Americans died of heart disease in 1997, *see* STATISTICAL ABSTRACT OF THE UNITED STATES 99 (1999), but this "small" percentage could hardly be thought to establish that *that* problem is insignificant.

Moreover, the small percentages reflected in the above-cited studies are misleading because they are based upon

[4] The actual impact of *Miranda*, of course, would be expected to differ from crime to crime; some may have a rate higher than 0.3%, and some may have less. The police and prosecution, for example, may be more willing to drop a burglary case with a tainted confession than a murder case. In such cases, the full costs of *Miranda*'s exclusionary rule include, not just dropped cases, but the additional expenditure of resources.

all cases, without regard to whether a confession was even obtained. In evaluating the efficacy of a rule, however, it makes sense to focus one's attention on the cases in which the rule is actually called into play. Stating that *Miranda* affects only 0.3% of *all* cases is a little like saying that smoke alarms "affect" only a tiny percentage of *all* homes on any given day (including those that don't experience a fire that day). Rather, the question is whether *Miranda* affects the outcome of those cases in which it is applied, *i.e.*, *those cases in which confessions are challenged*. That percentage is necessarily higher, and the effects of *Miranda* in such cases are unquestionably significant.

The available empirical evidence confirms what is obvious to anyone who has worked in the criminal justice system: The vast majority of *Miranda* suppression orders involve statements that are "voluntary" under a traditional Fifth Amendment/Due Process analysis. *See, e.g.*, Cassell, *supra*, 90 Nw. U.L. Rev. at 393 n.24 (summarizing evidence and concluding that "generally coerced confessions are quite rare"). That was certainly the experience of the undersigned counsel of record, who has previously noted, based on his service as an Assistant United States Attorney, that a judicial finding of involuntariness is "very rare." D. Collins, *Farewell* Miranda*?*, 1995 PUB. INT. L. REV. 185, 193 n.19 (reviewing J. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993)). Thus, the shift from a "voluntariness" exclusionary rule to *Miranda*'s exclusionary rule is *the* single determining factor in the significant majority of cases in which such suppression motions are granted.

Moreover, the statistical studies that have been conducted indicate that motions to suppress confessions are filed in approximately 1% to 6.6% of cases and are granted in anywhere from 2% to 50% of those cases, depending upon the jurisdiction and the time period studied. *See* P. Cassell & B. Hayman, *supra*, 43 U.C.L.A. L. REV. at 890 & n.243 (collecting studies). Although the resulting percentage of *all cases* in which *Miranda*'s exclusionary rule eliminates

a confession is less than 1%, the range of numbers found in these studies suggest that that rule has certainly had a significant impact on the disposition of suppression motions in particular jurisdictions. The remarkable suppression rate of *50%* found in one study indicates a very substantial impact in some places. *Id.* (citing FEENEY, *supra*, at 144).

Additionally, *Miranda*'s exclusionary rule undoubtedly has adverse effects beyond the complete dismissal of certain cases. Even if most of the cases in which suppression motions are granted are not ultimately dismissed, the exclusion of such highly probative evidence undoubtedly increases the likelihood of a disposition that is more favorable to the defendant—whether by acquittal or by a plea bargain on more favorable terms. One study, for example, found that the granting of a motion to suppress a confession had the effect of reducing the conviction rate in one jurisdiction from 94.1% to 66.7% (although the raw numbers in the study were apparently too small to permit a finding of statistical significance). *See* P. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. Ill. L. Rev. 223, 233 (Table 8).

Accordingly, even taking into account all of the limitations in the available evidence, it is clear that *Miranda*'s exclusionary rule operates to exclude voluntary confessions in thousands of cases each year; that many of these cases are dismissed as a consequence; and that there are adverse effects on the disposition of many of the remaining cases. Numbers, however, do not tell the whole story. One must not lose sight of the fact that these "small" percentages conceal individual injustices. Even some of *Miranda*'s staunchest defenders concede that "the release of only one guilty murderer or rapist is one too many. A single case of that sort must be counted as a substantial social cost, if the rules requiring that disposition are unjustified and if the harm they cause is avoidable." Schulhofer, *supra*, 90 NW. U.L. REV. at 502. Thus, even if the impact of *Miranda*'s exclusionary rule were only felt in a small number of cases,

the sometimes grave individual injustices created by the mindless inflexibility of that overbroad rule are intolerable. It is one thing for the courts to set a possibly guilty person free so that the *constitutional* right against compulsory self-incrimination is not violated; the Constitution expresses our Nation's belief that the unreliability and cruelty of coerced confessions have no place in our system. But it is quite another for the courts—in the name of a "prophylactic" rule—to systematically release guilty persons who have voluntarily given reliable confessions and whose constitutional rights have not been violated at all. Adherence to such a rigid exclusionary rule simply cannot be justified on the ground that it is required by the Constitution. *See Roberson*, 486 U.S. at 688 (Kennedy, J., dissenting) ("[T]he rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion.").

Undoubtedly many examples can be given of the injustices wrought by *Miranda*'s exclusionary rule, but a few will suffice to bring home the point that the effect of the rule is ultimately borne by crime *victims*. The persons harmed by *Miranda*'s inflexible rule include the victims of the various crimes that go unpunished as a result; the victims who must suffer through retrials after *Miranda*-based reversals; the victims who see lighter sentences meted out because the case had to be "plea-bargained" due to a *Miranda*-based confession problem; and, significantly, the victims of future crimes committed by recidivist beneficiaries of *Miranda*.[5]

One of the many casualties of *Miranda*'s harsh rule of exclusion is found in the State of Arizona's effort to convict the murderer of Dawn Dearing, a Tucson woman savagely

[5] Studies have consistently shown that arrestees with prior felony records are somewhat more likely to invoke their rights under *Miranda* than are those who lack a criminal record. P. Cassell & B. Hayman, *supra*, 43 U.C.L.A. L. REV. at 895-96. It is reasonable to conclude, therefore, that a disproportionate number of cases in which suppression is ordered under *Miranda* involve recidivists and career criminals.

beaten, sexually assaulted, and eventually murdered in her apartment. Among other atrocities committed on Ms. Dearing, a hot curling iron and the handle from a knife were found forced into her vagina. Tucson police received a tip pointing to Toribio Rodriguez, a former neighbor of Ms. Dearing's. While attempting to obtain fingerprint and blood samples pursuant to a court order, the police started to question Rodriguez; he made several incriminating statements, and he was arrested, tried, and ultimately convicted for Ms. Dearing's murder. The Arizona Supreme Court, however, determined that Rodriguez had been in custody when the police questioned him and therefore voided his conviction and sentence. *State v. Rodriguez*, 186 Ariz. 240, 245-47 (1996). By invoking *Miranda* as its sole ground for setting aside this initial conviction—the other nine points raised by Rodriguez were expressly rejected—the Arizona Supreme Court set in motion a series of retrials that have dragged on for several years.[6]

As noted earlier, the costs of *Miranda*'s exclusionary rule consist not only of those cases in which defendants escape justice altogether, but also of those in which the State and the victim or the victim's family must endure the burden of unnecessary retrials. A good example of the latter is the State of Connecticut's efforts to convict John Hoeplinger for the bludgeoning and strangulation of his wife in 1982. At his first trial, Hoeplinger was convicted of first degree manslaughter, but the conviction was reversed by the Connecticut Supreme Court on *Miranda* grounds. *State* v. *Hoeplinger*, 206 Conn. 278, 537 A.2d 1010 (1988). His second trial, at which he was again convicted, "lasted

[6] Rodriguez was tried and convicted a second time in 1996, but that conviction was reversed based on an instructional error related to the alibi defense he sought to present at that trial. *State* v. *Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). A third trial last year resulted in a hung jury, and the State has announced its intention to retry Rodriguez a fourth time. *See* "No Verdict in Third Mutilation-Murder Trial," A.P. State & Local Wire (June 9, 1999) (available on LEXIS).

more than four weeks," involved "[m]ore than 250 exhibits," and required lengthy and extensive testimony by numerous expert witnesses "regarding sophisticated forensic analyses, including blood spatter analysis" and other expert testimony. *State* v. *Hoeplinger*, 27 Conn. App. 643, 644, 609 A.2d 1015, 1016 (1992).

Another troubling case involves Missouri's prosecution of Roy Oldham. While on probation for the molestation of one child, Oldham was picked up on suspicion of molesting a second child. The Missouri Supreme Court, laboring under the compulsion of *Miranda*'s categorical rule of exclusion, overturned Oldham's conviction for the second molestation because Oldham had said he wanted to talk to the lawyer who represented him on the first charge. *State* v. *Oldham*, 618 S.W.2d 647, 648-49 (Mo. 1981).

And there is also the case of Barry Braeseke, who confessed to firing multiple rifle shots into his mother, father, and grandfather, because he wanted to clear the way to his inheritance. During questioning at the station house, Braeseke indicated he wanted to talk to a lawyer. Officers stopped questioning Braeseke and took him to be booked. When asked to identify his next of kin, Braeseke asked an officer if he could speak "off the record." Braeseke proceeded to ask a series of "hypothetical" questions about what would happen if he confessed to the killings. The officer told him he would appreciate any information the Braeseke might provide but that it would be better for the statement to be recorded. Braeseke decided to give the police a recorded statement. At the beginning of the tape, he said he was testifying of his free will and that he did not want to have a lawyer present. He then confessed to the killings. The California Supreme Court, however, held the officers had violated Braeseke's rights under *Miranda* by interviewing him. *People v. Braeseke*, 25 Cal. 3d 691, 602 P.2d 384 (1979), *vacated*, 446 U.S. 932, *judgment reinstated*, 28 Cal. 3d 86, 618 P.2d 149 (1980), *cert. denied*, 451 U.S. 1021 (1981).

Of course, the cases reported in published appellate reports are just the tip of an iceberg. Far more frequently, guilty individuals are never held accountable for their crimes, either because prosecutors, knowing that *Miranda* will bar introduction of the most relevant piece of testimony (and often their only evidence directly linking the suspect to the crime), decline to bring charges in the first place; or because judges, constrained by the exclusionary rule, throw the case out at the pretrial stage.

A horrific example of the latter situation involves the 1984 murder of Denise Hubbard Sanders. Ms. Sanders was shot in the head at point-blank range by Ronnie Gaspard, a member of the "Bandidos" motorcycle gang in Fort Worth, Texas. Gaspard confessed to having pulled the trigger in the execution-style killing because Ms. Sanders had been courageous enough to testify in an earlier case to the gang's drug-trafficking activity. Because Gaspard had the fortuity of having a lawyer assigned to him when he entered the jailhouse—and notwithstanding Gaspard's subsequent waiver of his right to see a lawyer—a judge felt compelled by *Edwards* to strike the confession. Gaspard was reported to have walked out of the courtroom that day with a "big smirky grin" on his face. Dept. of Justice Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation*, *reprinted in* 22 U. MICH. J.L. REFORM 437, 571-72 (1989).

These real-life cases vividly demonstrate the drastic consequences of *Miranda*'s *per se* rule of exclusion. The draconian impact of *Miranda*'s exclusionary rule strikes at the heart of a sovereign society's unquestioned right "to articulate societal norms through criminal law[.]" *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991).

3. The Other *Stare Decisis* Factors Weigh Heavily Against *Miranda*'s Exclusionary Rule

The Government and Petitioner also invoke *stare decisis* on the ground that *Miranda*'s sweeping exclusionary rule

has engendered reliance and has proven to be workable. Petr.'s Br. at 31-34; U.S. Br. at 31-38. None of these contentions has merit.

This Court has observed on numerous occasions that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne* v. *Tennessee*, 501 U.S. at 828 (internal citations omitted); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924). In this case, the Government and Petitioner argue that a generation or more has grown accustomed to the *Miranda* regime and that disturbing any part of that regime would greatly harm society. The parties, however, focus on the wrong argument: Because § 3501 does not set aside the warning requirement, any reliance interests in *that* requirement are irrelevant.[7] The parties have failed to explain what kind of "harm" society would in fact experience from application of the exclusionary rule only in those instances where a constitutional violation actually occurred. The fact that a generation has become familiar with the *Miranda* warnings simply does not mean that individuals have actually relied on the *exclusionary* rule in ordering their lives. *See Casey*, 505 U.S. at 855 ("The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.").

The parties and their *amici* also labor mightily to shoehorn this case into the extremely small category of "watershed decision[s]," which they contend should not be reexamined absent "the most compelling reason." *See*

[7] In any event, the asserted reliance interests are overblown. Reliance presumes knowledge, and it therefore makes no sense to speak of a suspect "relying" on being *told* his or her rights. There is also, of course, the reliance of screenwriters who would have to make the inevitable changes to television and movie scripts if the warnings were modified, but that interest seems entitled to little weight.

Petr.'s Br. at 44-45; U.S. Br. at 49-50. This rhetoric is misplaced here because, as already noted, this case does not require the Court to reconsider the authority for announcing the *Miranda* warnings or even to reconsider the warnings themselves. Rather, this case concerns only the scope of *Miranda*'s exclusionary rule—a rule this Court already has revisited and cabined numerous times. *See Harris*; *Tucker*; *Quarles*; *Elstad*. The Court's own precedents therefore belie the parties' claim that *Miranda*'s exclusionary rule enjoys a heightened immunity from reconsideration.

More fundamentally, the parties' effort to analogize this case to this Court's decision in *Casey* founders on its own terms. The *Casey* Court itself recognized only two decisions from the last half-century as falling into the class of "watershed decision[s]" that it suggested might require "the most compelling reason" for reexamination—and *Miranda* was not one of them. *See Casey*, 505 U.S. at 867 ("The Court is not asked to [issue such a decision] very often, having thus addressed the Nation *only twice* in our lifetime, in the decisions of *Brown* [*v. Board of Educ.*, 347 U.S. 483 (1954)], and *Roe* [*v. Wade*, 410 U.S. 113 (1973)]") (emphasis added). *Miranda*'s absence from this list can hardly be considered inadvertent. Indeed, the comparison to *Casey* fails on its own terms: Whatever the initial opposition to *Miranda* in 1966, it most assuredly is *not* true that, since then, "pressure to overrule the decision, like pressure to retain it, has grown only more intense." *Id.* at 869. Indeed, the not-so-benign neglect of 18 U.S.C. § 3501 by the Department of Justice makes clear how little institutional pressure has been placed on this Court on this issue. The parties' reliance on *stare decisis* rings hollow.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Dated: March 9, 2000

Respectfully submitted,

KRISTIN LINSLEY MYLES
KELLY M. KLAUS
AVITAL T. ZER-ILAN
MUNGER, TOLLES & OLSON LLP
33 New Montgomery Street
San Francisco, CA 94105
(415) 512-4000

Of Counsel:
David Castro
General Counsel
Center for the Community Interest
114 East 32 Street, Suite 604
New York, NY 10016
(212) 689-6080

DANIEL P. COLLINS
Counsel of Record
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae

Mar 9 2000

(34)

No. 99-5525

Supreme Court, U.S.
FILED
MAR 9 - 2000
CLERK

In the Supreme Court of the United States

CHARLES THOMAS DICKERSON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATES OF SOUTH CAROLINA, ET Al.,* AS AMICI CURIAE URGING AFFIRMANCE

CHARLES M. CONDON
Attorney General for the State of South Carolina
TREVA ASHWORTH
Deputy Attorney General
KENNETH P. WOODINGTON
Counsel of Record
Senior Assistant Attorney General
TRACEY COLTON GREEN
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Counsel for Amici States

*The States joining this brief are listed on the inside cover

BEST AVAILABLE COPY

39 pp

The States joining this brief are **South Carolina, Delaware, Colorado, Pennsylvania, Virginia, Tennessee, Florida, Nebraska, Hawaii, South Dakota, Alabama, Alaska, Mississippi, Utah, Idaho, Kansas and Nevada.** Also joining is the Territory of the **United States Virgin Islands.**

M. Jane Brady
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

Ken L. Salazar
Attorney General
State of Colorado
1525 Sherman Street, 7th Fl.
Denver, CO 80203

Frankie Sue Del Papa
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701-4717

Alan G. Lance
Attorney General
State of Idaho
P. O. Box 83720
Boise, ID 83720-0010

Mark L. Earley
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Michael C. Moore
Attorney General
State of Mississippi
P. O. Box 220
Jackson, MS 39205

D. Michael Fisher
Attorney General
Commonwealth of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Bruce M. Botelho
Attorney General
State of Alaska
P. O. Box 110300
Juneau, AK 99811-0300

Earl I. Anzai
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Mark Barnett
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

Paul G. Summers
Attorney General
State of Tennessee
425 5th Avenue, North
Nashville, TN 37243-0493

[continued on next page]

Bill Pryor
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130

Jan Graham
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114

Carla J. Stovall
Attorney General
State of Kansas
2nd Floor Kansas Judicial Ctr.
301 S.C. 10th Avenue
Topeka, KS 66612-1597

Don Stenberg
Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln, NE 68509-8920

Robert A. Butterworth
Attorney General
State of Florida
Plaza Level 01, The Capitol
Tallahassee, FL 32399-1050

Iver A. Stridiron
Attorney General
U.S. Virgin Islands
48B-50C Kronprindsens Gade
St. Thomas, U.S.V.I.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Exclusionary Rule Created By *Miranda* Is An Evidentiary Presumption That A Confession Elicited Without The Required Warnings Is Involuntary 4

II. Section 3501 Reflects A Congressional Judgment That The Presumption Of Inadmissibility Created By *Miranda* Is Rebuttable, And Should Be Construed As Establishing The Standards For Determining Whether The Presumption Should Be Deemed Rebutted In A Given Case 5

A. In Enacting Section 3501, Congress Determined That *Miranda*'s Irrebuttable Presumption Rule Should Be Modified 6

1. Section 3501 reflects the Congressional

determination that the procedures established by *Miranda* did not achieve the correct result in many cases 7

2. Section 3501 reflects the Congressional determination that the procedures established by *Miranda* were unsound 9

B. Section 3501 Should Be Construed As Permitting *Miranda*'s Irrebuttable Presumption To Be Rebuttable By A Showing Based On The Factors Listed In Section 3501 ... 11

III. Treating The *Miranda* Warnings As Establishing A Rebuttable Presumption Would Give The States The Opportunity To Experiment With Alternative Approaches To Regulating Interrogation 13

IV. A Holding By This Court That The Warnings Themselves Are Not Constitutionally Required Would Reinforce The Settled Conclusion That There Can Be No Section 1983 Liability For Failure To Provide The Warnings 16

V. The Application Of *Miranda*'s Prophylactic Rules To The States Should Be Approached With Caution 17

Conclusion 18

TABLE OF AUTHORITIES

CASES

Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976) 16

Berkemer v. McCarty, 468 U.S. 420 (1984) 13

Clay v. Brown, 151 F.3d 1032 (7th Cir. 1998) 16

Coleman v. Thompson, 501 U.S. 722 (1991) 7, 9

Continental T.V., Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977) 7

Cruzon v. Director, Mo. Dept. of Health,
497 U.S. 262 15

DeShawn v. Safir, 156 F.3d 340 (2d Cir. 1998) 16

Federal Trade Commission v.
American Tobacco Co., 264 U.S. 298 (1924) .. 12

Giuffre v. Bissell, 31 F.3d 1241 (3d Cir. 1994) 16

Hawkins v. United States, 358 U.S. 74 (1958) 6

Heath v. Alabama, 474 U.S. 82 (1985) 17

Interest of Dino, 359 So.2d 586 (La. 1978) 14

Kelly v. Robinson, 479 U.S. 36 (1986) 18

Lucero v. Gunter, 17 F.3d 1347 (10th Cir. 1994) 16

Mahan v. Plymouth County House of Corrections,
64 F.3d 14 (1st Cir. 1995) 16

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 18

Murray v. Giarratano, 492 U.S. 1 (1989) 16

Mu'Min v. Virginia, 500 U.S. 415 (1991) 17

New York v. Harris, 495 U.S. 14 (1990) 15

New York v. Quarles, 467 U.S. 649 (1984) 4

Oregon v. Elstad, 470 U.S. 298 (1985) 4

People v. Harris, 77 N.Y.2d 434,
568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) ... 15

People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419,
348 N.E.2d 894 (N.Y. 1976) 15

Rust v. Sullivan, 500 U.S. 173 (1991) 11

Smith v. Phillips, 455 U.S. 209 (1982) 17

Smith v. Robbins, 120 S. Ct. 746 (2000) 4, 15, 16

State v. Jones, 205 Conn. 638,
534 A.2d 1129 (1987) 14

State v. Prevost, 141 N.H. 647,
690 A.2d 1029 (1997) 14

State v. Prickett, 324 Or. 489,
930 P.2d 221 (Ore. 1997) 14

State v. Santiago, 53 Hawaii 254,
492 P.2d 657 (1971) 14

State v. Scales, 518 N.W.2d 587 (Minn. 1994) 15

Stephan v. State, 711 P.2d 1156 (Alaska 1985) 15

Tot v. United States, 319 U.S. 463 (1943) 6

Traylor v. State, 596 So.2d 957 (Fla. 1992) 14

Turner Broadcasting System, Inc.
v. F.C.C., 520 U.S. 180 (1997) 8

United States v. Lopez, 514 U.S. 549 (1995) 17

United States v. Gainey, 380 U.S. 63 (1965) 9

United States v. Provident Trust Co.,
291 U.S. 272 (1934) 7, 10

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 6

Vance v. Terrazas, 444 U.S. 252 (1980) 6

Victor v. Nebraska, 511 U.S. 1 (1994) 17

Warren v. City of Lincoln, 864 F.2d 1436 (1989) 16

Willy v. Coastal Corp., 503 U.S. 131 (1992) 6

Winsett v. Washington,
130 F.3d 269 (7th Cir. 1997) 16

CONSTITUTION AND STATUTES

18 U.S.C. § 3501 ..... *passim*

42 U.S.C. § 1983 ..... 3, 16

Ariz. Rev. Stat. Ann. § 13-3988 15

U.S. Const., Art. 1, § 8, cl. 9 6

OTHER

Best, Presumptions of Law and Fact (1844) 10

INTEREST OF AMICI

The interest of the States in this case is obvious, even though 18 U.S.C. Section 3501 applies only in federal criminal proceedings. To the extent, if any, that the Court permits the admission of unwarned but voluntary confessions under Section 3501, some States undoubtedly would adopt procedures similar to any which this Court might approve.

Even though the Court stated in *Miranda* that the procedures set forth therein should not be regarded as "a constitutional straitjacket which will handicap sound efforts at reform," 384 U.S. at 467, the case has been regarded as just that for nearly thirty-four years. Subsequent cases have not approved alternatives to the *Miranda* procedures–they have only found instances where for one reason or another the procedures did not apply. The States thus have an abiding interest in seeing how they might develop "increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of [state] criminal laws." 384 U.S. at 467. The effectuation of this promise made by the *Miranda* court is an event which is long overdue.

The States also have an overpowering interest in seeing that the guilty are punished and the innocent set free. To the extent that it prevents voluntary confessions from occurring at all, *Miranda* increases the chances that the innocent will be punished; and to the extent that it prohibits the use of voluntary confessions once given, *Miranda* greatly increases the chances that the guilty will be set free.

SUMMARY OF ARGUMENT

The holdings of *Miranda* and the provisions of Section 3501 may and should be read together harmoniously as creating a rule which expresses a strong preference for giving the *Miranda* warnings but without automatically requiring the suppression of confessions which are voluntary but unwarned. By permitting the admission of unwarned but voluntary confessions upon a strong showing of voluntariness, this proposed procedure would preserve the dual ends of preventing involuntary custodial confessions while at the same time preventing acquittals based on technicalities.[1]

Miranda's exclusionary rule for unwarned custodial confessions amounts to an irrebuttable presumption that such confessions are involuntary. The Court's language in *Miranda* indicates that the rule thus created was intended by the Court to be a rule of procedure or evidence, subject to modification by Congress and the States.

In the late 1960's, Congress conducted hearings and developed evidence showing the effects of *Miranda* on law enforcement. After weighing the competing policies in light of the facts it found, Congress enacted Section 3501.

---

[1] Amici States are aware, of course, that the United States and others argue that if Section 3501 is read as simply reinstating the pre-*Miranda* voluntariness test, then either the statute must be regarded as unconstitutional, or *Miranda* must be substantially modified in order to accommodate the statute. Amici States submit that the two can be harmonized without the need for such a collision.

It is not necessary to overrule *Miranda* in order to hold Section 3501 constitutional. Section 3501 should be given a reading which will preserve its constitutionality and harmonize it with *Miranda*. Section 3501 thus should be read as substituting a rebuttable presumption for *Miranda*'s irrebuttable presumption, that is, as Congress's mandate concerning the standards which need to be met if the confession is still to be admitted. Applying the statute in this manner is permissible in order to preserve its constitutionality.

If the Court permits the use of the standards in Section 3501 as a means to rebut *Miranda*'s presumption of inadmissibility, the States would then be given the opportunity to craft rules of their own which would balance the need for voluntary confessions with the need to protect Fifth Amendment rights. Such state procedures could simply copy the approach of Section 3501, or they could be more innovative. For instance, a guarantee of voluntariness might be obtained through videotaping of custodial confessions, a measure which was not conveniently available in the late 1960's.

If the Court reaffirms that the *Miranda* warnings are not themselves constitutional rights, such a holding would preserve the existing rule that law enforcement officers are not liable under 42 U.S.C. § 1983 for not giving the warnings.

Finally, the States submit that regardless of the outcome of this case, the Court should reiterate that the *Miranda* procedures were intended as provisional,

prophylactic rules which may be modified by appropriate state and federal rulemaking bodies.

ARGUMENT

I. The Exclusionary Rule Created By *Miranda* Is An Evidentiary Presumption That A Confession Elicited Without The Required Warnings Is Involuntary.

This Court has described *Miranda's* exclusionary rule as a presumption. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (1985)(*Miranda* violation affords a "legal presumption of coercion, requiring suppression of all unwarned statements)"; *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984)(under normal circumstances, an unwarned confession is "presumed compelled"). In *Oregon v. Elstad, supra,* the presumption is characterized as "irrebuttable for purposes of the prosecution's case in chief." 470 U.S. at 307.[2]

The language of the *Miranda* opinion indicates that the Court regarded its exclusionary rule as a rule of evidence. Thus, for instance, the Court spoke of "potential

[2] As other amici in support of affirmance are arguing, the warnings themselves are "prophylactic" and therefore not constitutionally required. Because the *Miranda* warnings are prophylactic in nature, the *Miranda* procedure "is merely one method of satisfying the requirements of the Constitution" to protect the right against compulsory self incrimination. As a result, Congress and the States may "craft procedures that, in terms of policy, are superior to, or at least as good as," those in *Miranda*. *Smith v. Robbins*, 120 S. Ct. 746, 759 (2000).

alternatives for protecting the [Fifth Amendment] privilege which might be devised by Congress or the States in the exercise of *their creative rule-making capacities*." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)(emphasis added). *See also,* 384 U.S. at 490 ("the Constitution does not require any *specific code of procedures* for protecting the privilege")(emphasis added). Moreover, the Court regarded its rule as only a provisional one, to remain in effect only for as long as it took Congress or the States to enact other procedures which would serve the same functions. This view is reflected in the Court's encouragement to Congress and the States "to continue their laudable search for increasingly effective ways of promoting the rights of the individual while promoting effective enforcement of our criminal laws." *Id.* All of this language clearly describes the processes used to revise procedural rules; such language is inconsistent with any argument that the exclusionary rule was so critical to the decision that it could not be altered in the least by Congress or the States.[3]

II. Section 3501 Should Be Construed As Reflecting Congress's Judgment That The Presumption Of Inadmissibility Created By *Miranda* Is Rebuttable, And As Establishing The Standards For Rebutting the Presumption.

[3] In addition, if the conclusive presumption of inadmissibility were regarded as a fixed constitutional rule, a number of qualifying statements by the *Miranda* majority would be rendered meaningless. *See, e.g.*, 384 U.S. at 467 ("[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform").

A. In Enacting Section 3501, Congress In The Exercise Of Its Rulemaking Power Determined That *Miranda*'s Irrebuttable Presumption Rule Should Be Modified.

One of the most durable principles of federal jurisprudence is that Congress has the power "to prescribe rules of evidence and standards of proof in the federal courts." *Vance v. Terrazas*, 444 U.S. 252, 265 (1980). This "traditional" power, *id.*, has been recognized "[f]rom almost the founding days of this country." *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992). The roots of this Congressional authority lie in the constitutional authority of Congress to create inferior federal courts. U.S. Const., Art. 1, § 8, cl. 9. *Vance, supra,* cites a number of other cases in which this "undoubted" power of Congress has been noted and sustained. 444 U.S. at 266, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976); *Hawkins v. United States*, 358 U.S. 74, 78 (1958); and *Tot v. United States*, 319 U.S. 463 (1943).

Section 3501 represents an exercise of this Congressional power to prescribe rules of evidence and standards of proof. The enactment of this legislation was explicitly undertaken pursuant to Congress's "power to prescribe rules of evidence in Federal courts," and in "respon[se] to the [*Miranda*] majority's invitation to Congress" to do so. [Senate Comm. Report, 1968 U.S.C.C.A.N. at 2137]. By enacting Section 3501, Congress concluded that *Miranda*'s irrebuttable presumption of inadmissibility failed to achieve the correct result in an unacceptably high number of cases and therefore was based on an unsound policy.

1. Section 3501 reflects the Congressional determination that the procedures established by *Miranda* did not achieve the correct result in many cases.

In determining whether a conclusive presumption should be imposed, the issue is whether the "supposed injurious results" from admitting evidence are "of greater consequence than the predominance of truth over error. . . ." *United States v. Provident Trust Co.*, 291 U.S. 272, 282 (1934). The *Miranda* court undoubtedly believed that the "supposed injurious results" of permitting unwarned custodial questioning were harmful enough to require the exclusion of all unwarned custodial confessions. After reviewing several years' experience with *Miranda*, however, Congress disagreed with both the factual and policy judgments of the Court on this issue.

There was nothing in the record of *Miranda* which suggested that holding unwarned confessions to be involuntary "achieve[d] the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722 (1991). To hold otherwise would be to suggest that practically all custodial confessions in the pre-warning era were involuntary. Moreover, even if a substantial percentage of all unwarned custodial confessions were in fact involuntary (a fact as to which there is no evidence), the remaining cases, i.e., the ones in which the presumption is wrong, are not unimportant cases. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977)(presumptions reflect a "judgment that [cases involving exceptions] are not sufficiently common or important to justify the time and

expense necessary to identify them"). To the contrary, in many cases the exclusion of an unwarned but voluntary confession precludes the successful prosecution of the person who confessed. Many, if not all, of the offices of Attorney General of the amici States have been directly involved in such cases.

Even though *Miranda*'s irrebuttable presumption has undoubtedly led to the suppression of voluntary confessions in a number of cases, the Court's rule was, prior to action by Congress, the only procedure in place to effectuate the core holdings of the case. However, it is undeniable that Congress had before it a great deal more information than could be placed before the Court in a single case; in addition, Congress had the benefit of reviewing the results of several years of the *Miranda* rules being applied in practice.

This Court has frequently recognized that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997). Indeed,

> [t]he process of making the determination of rationality [of presumptions] is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

United States v. Gainey, 380 U.S. 63, 67 (1965). This rule is appropriate for this case: the determination of the overall numbers and types of cases in which involuntary confessions occur, or in which guilty defendants go free, is not within "specialized judicial competence." The courts can only adjudicate one case at a time, and individual criminal cases do not provide vehicles for the presentation and review of facts concerning *Miranda*'s effects.[4] Moreover, as *Gainey, supra,* indicates, Congress's findings receive this deference even when the conclusive presumption establishes substantive criminal liability, rather than a mere evidentiary presumption.

2. Section 3501 reflects the Congressional determination that the procedures established by *Miranda* were unsound.

This Court has held that "conclusive presumptions [are] designed to avoid the costs of excessive inquiry where a per se rule will achieve the correct result in almost all cases." *Coleman v. Thompson, supra*. In addition to simple convenience, a conclusive presumption reflects the choice

---

[4] The difficulties of presenting verifiable "legislative facts" in a single criminal case are perhaps inadvertently illustrated by the amicus brief of Griffin B. Bell, et al. In contrast to the "Brandeis brief" approach of collecting judicially-noticeable facts for presentation to the Court, the Bell brief presents a collection of *opinions* about facts, given largely to news media. Amicus Brief of Bell, et al., at 8-11. By contrast, statements given to legislative committees can be tested by questions from individual Congressmen or state legislators; and statements in court, if these facts were actually on trial, could be tested through cross-examination.

to advance a "policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof." *United States v. Provident Trust Co., supra.* In the same case, the Court quoted an 1844 treatise as follows:

> By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favor, is an act which can only be justified by the clearest expediency and soundest policy.

Id. at 282, quoting Best, Presumptions of Law and Fact, § 18 (1844).

The Senate Committee Report on Section 3501 states that the Committee heard a "mass of evidence," which included "[i]nstance after instance" of documented post-*Miranda* cases "where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt." S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. at 2132. Based on this evidence, the Senate Committee was "convinced . . . that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement." *Id.* The Committee further concluded that

> it simply makes no sense to exclude from a jury what has traditionally been considered the very highest type of evidence, and the most convincing evidence of guilt, that is, a voluntary confession or incriminating statement by the accused.

Id. at 2136.

Simply put, the *Miranda* court's procedural mechanism for insuring that confessions complied with the Fifth Amendment was to exclude as involuntary all unwarned confessions. Congress, exercising its rulemaking powers for the federal courts, disagreed.[5]

B. Section 3501 Should Be Construed As Permitting *Miranda*'s Irrebuttable Presumption To Be Rebuttable By A Showing Based On The Factors Listed In Section 3501.

It is axiomatic that a limiting construction can be placed on a statute where necessary to resolve any doubt about the statute's constitutionality. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 191 (1991)(citing cases for the "elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"). The assumption underlying this rule

---

[5] Petitioner and the United States make no effort to discuss statistics dealing with the effects of *Miranda*. The United States claims that the effects of *Miranda* are still a matter of debate. U.S. Br. at 32 n.23. However, no amount of statistical massaging can conceal the dramatic drop in the rate of cleared violent crimes which began just after *Miranda* and which has remained at the lower levels ever since. This information is reproduced in a chart which appears as Appendix A to the Brief Amicus Curiae of Washington Legal Foundation in Partial Support of Petitioner.

is that Congress is aware of constitutional limitations on its power and seeks to tailor its legislation accordingly. As stated by Justice Holmes in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924):

> We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.

264 U.S. at 307. It is clear from the legislative history that Congress intended to restore voluntariness to the limits of its constitutional power to do so. If the only way to hold Section 3501 constitutional is to limit its use to rebutting the *Miranda* presumption that unwarned confessions are involuntary, such an application of the statute would be consistent with the overall intent of Congress. The language of the statute can be taken as it is, and applied only as a means of rebutting *Miranda*'s presumptions, rather than as a stand-alone test of admissibility. Such a construction would not strain the language of the act.

The States accordingly submit that the appropriate result is for the Court to preserve as much of Section 3501 and the *Miranda* decision as may be made mutually consistent. This can be accomplished by reiterating (a) that a warned confession will normally be regarded as voluntary, and an unwarned one will be presumed involuntary, but (b) by also holding that Congress may alter the irrebuttable presumption created by *Miranda*, and that Section 3501 should be construed as establishing the standards for rebutting the presumption of involuntariness which would still attach to an unwarned custodial confession. Such a

construction would preserve much of the Congressional intent while at the same time preserving the general rule of *Miranda* that the warnings are the best evidence of voluntariness.[6]

The practical effect of the result the States urge is that in most cases the warnings will continue to be given. When law enforcement officers administer the warnings required by *Miranda*, any resulting confession is normally regarded as voluntary and admissible, *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984), so a strong incentive exists for giving the warnings and eliminating the possibility that a confession will be excluded. The amici States submit, however, that in cases where for some reason the warnings are not given, Section 3501 should be construed as allowing the presumption of inadmissibility to be overcome by a showing that the confession was in fact voluntary, using the standards set forth in Section 3501 as a guideline.

III. Treating The *Miranda* Warnings As Establishing A Rebuttable Presumption Would Give The

---

[6] Even if applying Section 3501 in this way would cause the statute to apply less fully than Congress intended, this interpretation is infinitely closer to Congress's intent than the suggestion by amicus House Democratic Leadership that Section 3501 should be regarded as nothing more than "largely symbolic." Br. of House Democratic Leadership at 19. This startling approach to the validity of legislation is at odds with centuries of precedent in which the courts have striven to avoid declaring statutes invalid. Thus while some amici urge that Congressional statutes can be regarded as "symbolic," others urge that in litigation, untested opinions can substitute for facts, *see* n.4, *supra*. These views are generally inconsistent with the concept of democratic self-government.

States The Opportunity To Experiment With Alternative Approaches To Regulating Interrogation.

If Section 3501 is upheld as establishing standards for determining the admissibility of confessions obtained without the *Miranda* warnings in federal cases, the effect of such a decision will be to permit the States to craft standards of their own. Some States will no doubt continue to follow the *Miranda* procedures. *See, e.g., State v. Jones*, 205 Conn. 638, 534 A.2d 1129, 1202 n.3 (1987) (recognizing that *Miranda* warnings have independent significance under the state constitution); *Traylor v. State*, 596 So.2d 957, 965-66 (Fla. 1992) (result similar to *Miranda* under the Self-Incrimination Clause of Article I, Section 9, Florida Constitution); *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657, 664 (1971) (similar, applying Hawaii Constitution's privilege against self-incrimination); *State in Interest of Dino*, 359 So.2d 586, 589 (La. 1978), cert. denied, 439 U.S. 1047 (discussing La. Const. Art. 1, § 13 and concluding "[b]y adoption of this provision Louisiana enhanced and incorporated the prophylactic rules of Miranda v. Arizona"); *State v. Prevost*, 141 N.H. 647, 690 A.2d 1029, 1032 (1997) ("In New Hampshire, before evidence obtained during custodial interrogation can be used against a defendant, the State must establish 'beyond a reasonable doubt that the defendant was apprised of his constitutional rights and that his subsequent waiver was voluntary, knowing, and intelligent"); *State v. Prickett*, 324 Or. 489, 930 P.2d 221, 223 (Ore. 1997) ("This Court has held that Article I, section 12 [of the Oregon Constitution] requires that a police officer give Miranda-like warnings before questioning a person

who is in 'full custody'"); Texas Code Crim. Proc. Ann. art. 38.22 (codifying *Miranda* warnings and exceptions).

Other States may experiment with approaches such as videotaping or audiotaping of interrogations. *See Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (requiring electronic recording custodial interrogation under Alaska Constitution); *State v. Scales*, 518 N.W.2d 587, 591-93 (Minn. 1994) (requiring electronic recording of custodial interrogation under court's supervisory power). Other States may move more in the direction of Section 3501. See Ariz. Rev. Stat. Ann. § 13-3988 (similar to 18 U.S.C. § 3501(a), -(b), and -(d)).

Finally, some States may decide go beyond the Miranda rules and give even more protection to suspects. See, e.g., *People v. Harris*, 77 N.Y.2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) (declining to follow *New York v. Harris*, 495 U.S. 14 (1990), on grounds of "indelible" right to counsel under New York law that cannot be waived outside presence of an attorney); *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (N.Y. 1976) (once police know or have reason to know that an attorney has become involved in the case of a suspect in custody, they many not obtain a waiver of the right to counsel in the absence of that attorney).

Regardless of the precise response of the States to a decision upholding Section 3501, the result would be that "the laboratory of the States" would be directed toward "the . . . challenging task of crafting appropriate procedures." *Cruzon v. Director, Mo. Dept. of Health*, 497 U.S. 262, 292 (O'Connor, J., concurring); *Smith v. Robbins, supra*, 120

S.Ct. at 758 (2000). No longer would *Miranda*'s procedures stand as a judicially-imposed "categorical remedy [which] pretermit[s] other responsible solutions being considered in Congress and state legislatures." *Smith v. Robbins, supra,* at 758 (quoting Kennedy, J., concurring, in *Murray v. Giarratano*, 492 U.S. 1, 14 (1989)).

IV. A Holding By This Court That The Warnings Themselves Are Not Constitutionally Required Would Reinforce The Settled Conclusion That There Can Be No Section 1983 Liability For Failure To Provide The Warnings.

A reaffirmance by this Court of the non-constitutional character of the *Miranda* rules would prevent the unnecessary expansion of civil liability against police agencies. Many federal courts of appeals have concluded that because the *Miranda* procedures are not required by the Constitution, departures from them are not actionable under 42 U.S.C. § 1983. *See, e.g., Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *DeShawn v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994); *Clay v. Brown*, 151 F.3d 1032 (7th Cir. 1998)(table); *Winsett v. Washington*, 130 F.3d 269, 274 (7th Cir. 1997); *Warren v. City of Lincoln*, 864 F.2d 1436, 1441-42 (8th Cir. en banc), cert. denied, 490 U.S. 1091 (1989); *Lucero v. Gunter*, 17 F.3d 1347, 135-51 (10th Cir. 1994); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976). In the swirling and often harried circumstances in which police questioning must of necessity often place, it would be inappropriate to allow line law enforcement officers and their employing agencies to be sued whenever they deviated from the *Miranda* regime.

V. The Application Of *Miranda*'s Prophylactic Rules To The States Should Be Approached With Caution.

In keeping with principles of federalism, this Court repeatedly has acknowledged that it has no supervisory powers over state-court proceedings beyond those necessary "to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) ("Our cases dealing with the requirements of voir dire are of two kinds: those that were tried in federal courts, and are therefore subject to this Court's supervisory power * * * and those that were tried in state courts, with respect to which our authority is limited to enforcing the commands of the United States Constitution"); *Victor v. Nebraska*, 511 U.S. 1, 17 (1994) ("we have no supervisory power over the state courts").

Accordingly, even if Section 3501 should be declared invalid, amici States would urge that the Court proceed cautiously in describing the manner in which the *Miranda* warnings apply to the States. Because this Court has held that the warnings are merely prophylactic, the requirements should be regarded as, at most, interim procedures which protect constitutional rights only until other procedures can be adopted by state bodies with the power to set such rules for the courts of the States. Any suggestion that the States cannot alter prophylactic rules, or that such rules may only be altered by federal authorities, creates a risk to our federal system of government, under which the "primary authority for defining and enforcing the criminal law" rests with the States, *United States v. Lopez*, 514 U.S. 549, 561 n. 3 (1995). *See also, Heath v. Alabama*, 474 U.S. 82, 93 (1985)

("The Constitution leaves in the possession of each State 'certain exclusive and very important portions of sovereign power.' * * * Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code"); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("This Court has emphasized repeatedly the fundamental policy against federal interference with state criminal prosecutions."); *Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege"). The States therefore respectfully submit that the Court should reaffirm the powers of Congress and the States, respectively, to make appropriate alterations to prophylactic rules.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES M. CONDON
Attorney General for the
State of South Carolina

TREVA ASHWORTH
Deputy Attorney General

KENNETH P. WOODINGTON
Counsel of Record
Senior Assistant Attorney General

TRACEY COLTON GREEN
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

March 9, 2000